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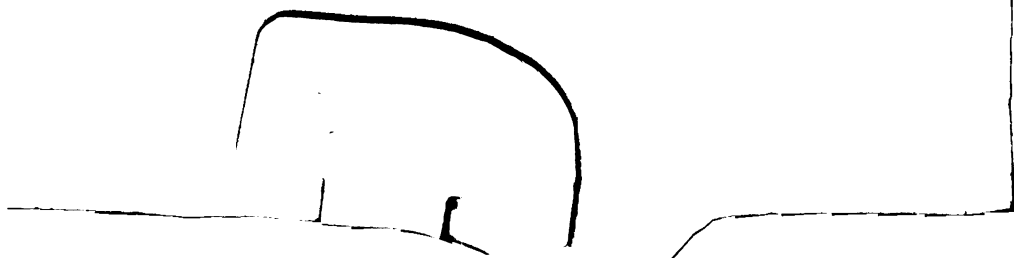
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PATTEE'S
ILLUSTRATIVE CASES
IN REALTY

PART I—LAND





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let to

ILLUSTRATIVE CASES

IN

REALTY.

BY

W. S. PATTEE, LL. D.,

DEAN OF COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.



PHILADELPHIA:

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PREFACE.

THE advantage of having in the student's hands cases illustrative of the principles discussed in the lecture, has been demonstrated so clearly in the subjects of Contracts, Personalty, and Equity, that I have been encouraged to prepare for my students, and those who desire to use them, a similar collection of cases in Realty.

The whole work will consist of three parts: Part I, Land. Part II, Estates in Land. Part III, Title to Land.

Part I is presented at the present time, with the expectation of having the succeeding parts ready for use during the next school year.

American cases of recent date are selected, as a general rule, because the student should be familiar, as he enters upon his professional career, with the cases most easily accessible and most generally used in the Courts of to-day. English cases and ancient authors are cited for reference, and the student is encouraged to examine them so far as he can without neglecting the more recent illustrations of the same principles found applied to the existing facts and conditions of to-day.

W. S. PATTEE, LL. D.,
Dean of College of Law.

UNIVERSITY OF MINNESOTA,
JANUARY 1, 1894.

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ILLUSTRATIVE CASES

IN

REALTY.

LAND.

Land includes the soil of the earth and every tangible thing permanently connected therewith, either by nature or art, and extends from the surface indefinitely upward and downward.

PRINCIPLE.

Quicquid plantatur, solo solo cedit.

SOIL.

RILEY *et al.* v. BOSTON WATER POWER Co. *et al.*

Supreme Judicial Court of Mass., 1853.

11 Cush. 11.

DEWEY, J. It is certainly true that for an injury to his real estate, the party cannot maintain trover. That form of action is appropriate exclusively to the recovery of damages for the unlawful conversion of personal property. But this being granted, the further inquiry is, whether the three hundred and ninety-four squares of earth severed from the land of the plaintiffs, and removed from the same and sold to the defendants, and used by them, was at the time of such purchase by the

defendants, and use of the same, still a part of the realty, and retained unchanged its character as such, or whether by the act of separation in fact, and a removal of the earth to a distant place, it has not changed the character of the earth so removed to that of personal property. It seems to us that it is very well settled that whatever is severed from the land—as, in the familiar case of standing timber trees—if such trees, being a part of the realty, are cut down, they cease to be real estate, and become personal. But this transmutation, while it changes the character of the property in this respect, does not change its ownership. It would not do so if cut down by the owner of the land, and not any more so, by being cut down by a person entering unlawfully upon the land and making the severance. It is the actual severance that changes the property from real to personal, and that irrespective of its being done with, or without, the consent of the owner of the land. And in this respect we see no distinction between removing living trees, deriving their nourishment from the earth, and the removal of a portion of the earth itself.

It is next objected that the plaintiffs, by bringing this action of trover, and waiving their action of trespass *quare clausum*, have adopted and sanctioned the original act of trespass, and therefore cannot maintain this action against one who purchased the earth *bona fide* of the trespassers. We do not perceive that any such claim appears. It is true that the plaintiffs have not elected to institute an action of trespass *quare clausum* against the original wrong-doers. But as regards these defendants, who have the property of the plaintiffs without right, nothing is waived; they did not commit any trespass upon the plaintiffs' land, and no action could have been maintained against these defendants therefor. Their first connection with the plaintiffs' property was after it had been severed from the realty, and the only mode of enforcing a claim against them for the value of the same is by a personal action. If the plaintiffs have not this remedy, they are remediless as to any recovery against those who have received and converted to their own use their property. Take the case of valuable timber trees, cut down

and carried away from the land, and sold by a mere trespasser. Is the owner of the same deprived of all remedy against any person who may have received these timber trees by purchase from the trespasser? He is so, unless trover will lie; for trespass *quare clausum* will not lie against such purchaser.

It is further contended that if the defendants were *bona fide* purchasers, and without notice of the trespass, the plaintiffs must prove a demand on the defendants, and a refusal by them to redeliver before the commencement of the action. The Court ruled upon this point, if such purchase was made in the manner above stated, yet, if they received the earth from the trespassers by a purchase for their own use, and directed that the same be deposited on the filling-ground, they would be liable without any such demand and refusal. This ruling may be fully supported upon the ground of a conversion in fact of the earth, and the impracticability of a redelivery of the earth after it had become thus intermingled with the soil of the land on which it was placed, and had become a part of the solid earth. Whenever there has been an actual conversion, or whenever the property has been thus appropriated, it is evidence of a conversion which supersedes the necessity of any demand. This view is to us a satisfactory answer to the objection here urged, that there was no proof of a demand. But, upon other grounds, under the late decision of this Court in the case of *Stanley v. Gaylord*, 1 Cush. 536, a case where the whole subject was much considered, and where the Court came to the result that a *bona fide* purchase from one who had the actual possession of the property, but without any right to retain possession as against the lawful owner, and actual taking the same under such purchase into the custody and control of the purchaser, would subject him to an action of trespass or trover at the suit of the lawful owner, without any previous demand.

Exceptions overruled.

WILLIAMS REAL PROP. 14-15, 496, note a.

THINGS IMBEDDED IN THE SOIL.

KIER v. PETERSON.

Supreme Court of Pennsylvania, 1861.

41 Pa. St. 357.

WOODWARD, J. I concur in the judgment of the majority, on the ground that the plaintiff's action was misconceived. I hold that trover was not his appropriate remedy. A few words will suffice to exhibit my views.

Petroleum, or, as it is called in the West Indies, Barbadoes tar, is a species of mineral, which, while it exists in its natural deposits in the earth, is included in the very comprehensive idea which the law attaches to the word *land*. It is part of the land. It is land. As such it belonged to Peterson, in the place where the present dispute arose. He held it by the same title by which he held the surface, or the salt which underlay the surface. He was absolute proprietor of all things between the surface and centre of the earth at that place, saving only the government's right to share in the gold and silver that might be found. It was his freehold, and the petroleum and the salt were parts of the freehold.

By the article of agreement of October 30, 1837, he leased the premises to Thomas and Samuel M. Kier, for purposes of salt-wells. Under certain conditions and restrictions the lease was to endure as long as the salt-wells should be carried on by the Kiers, the survivor of them or their assigns. The rent reserved was every twelfth barrel of salt made on the premises. It was in effect and substance a sale of the crude salt in the land for one-twelfth of the manufactured article. Now, there is no doubt that the absolute owner of land may sell a partial interest in it as well as the whole. He may sell the surface and retain the minerals, or he may sell one or more of the minerals and retain the surface. This is every day's experience in the mining districts.

But it is self-evident that when he carves out a particular interest and sells it, he retains all the rest as absolutely as

before he conveyed a part. Therefore I cannot doubt that Peterson was as exclusively and as absolutely the owner of the petroleum in this land after the lease of October 30, 1837, as before. There is not a word in the instrument which imports his intention to part with anything more than the salt in his land, and such timber and stones as should be necessary for erecting and maintaining saltworks. Every matter and thing in and pertaining to the land which was not conveyed to the Kiers by that instrument was retained by Peterson.

But the Kiers could not exercise their right to raise salt without raising petroleum. They severed both the salt and the petroleum from the freehold, and brought both to their lawful possession at the surface. They were not trespassers. The severance of the petroleum was an inevitable incident of their exercise of clearly granted rights. The grant of the right to take salt was the grant of all incidental rights which were indispensable to the exercise of the main one. Hence, their severance of the petroleum from the freehold, and their possession of it, were lawful. The work of separating the oil and salt was not difficult. With opportunity given them the fluids would separate themselves. But the Kiers, in lawful possession of both before separation, were to control the work of separation, and were in lawful possession of each after that work was accomplished. For this reason I hold the action of trover will not lie. Although Peterson had not lost his right of property in the petroleum, yet a mere right of property in a chattel is not sufficient to maintain trover. The plaintiff must have also the right of possession at the time of conversion: 1 Chit. Pl. 164; Saunders P. & E. 1138. In *Mather v. Trinity Church*, 3 S. & R. 509, the principle was carried further still, and it was held that trover for stone and gravel dug from land does not lie by one who has the right of possession, against a person who has actual adverse possession of the land and sets up title to it. In our case, Peterson had no right of possession of the land whatever, and the Kiers were not in as mere adverse holders, but Peterson had conveyed the right of possession to them, and they were in under and according to his title. Nor

were they guilty of waste in severing the petroleum from the freehold, since it was an inseparable consequence from the right granted to them by the landlord. Their actual possession, therefore, of the severed chattel was in every sense a rightful possession, and because no right of possession existed in Peterson at the moment of severance, trover will not lie.

On this ground alone I am for reversing the judgment. I hold Peterson entitled to compensation for the value of his oil, and I suppose a bill in equity for account would be his most natural and efficacious remedy. I think the learned Judge below apprehended correctly the measure of compensation. Peterson would not be entitled to the labor of the Kiers, but only to the value of the oil at the instant of separation from the freehold. But his remedy, whatever the extent of it, is to be sought in another form of action.

NOTE.—Gold and silver. *Moore v. Smaw*, 17 Cal. 195; *Lyddall v. Weston*, 2 Atk. 19.

OCEAN GROVE CAMP MEETING ASSN. *v.* ASBURY PARK.

Court of Chancery, New Jersey, 1885.

40 N. J. Eq. 447.

BIRD, V. C. More than fifteen years ago the complainants purchased a large tract of land fronting upon the ocean, chiefly for the purposes of a summer resort, to exercise the right of worship. The enterprise has so grown that in winter it has a population of about five thousand, and in summer of ten thousand or fifteen thousand. The authorities soon discovered that to preserve the good health of the residents and visitors it was absolutely necessary to improve their water-supply and sewerage system. To do this they bored for water, and at the depth of over four hundred feet struck water which gave them a flow of fifty gallons per minute, at an elevation above the surface of twenty-eight feet. This they carried into the city by means of pipes, and supplied therewith about seventy

hotels and cottages. They also applied it to the improvement of their sewerage system. The volume of water thus produced continued to flow undiminished in quantity and with unabated force until the action of the defendants now complained of, and to restrain which the bill in this cause was filed.

The commissioners of Asbury Park, a corporate body, purchased a large tract of land immediately north and adjacent to the tract owned by Ocean Grove. Under their management this, too, has become a famous seaside resort. Its population is equal to, if not greater, at all times, than that of Ocean Grove. The authorities saw a like necessity for an increased supply of wholesome water. They entered into a contract with others, a portion of these defendants, to procure for them water by boring in the earth. These, their agents, sank several shafts to the depth of over four hundred feet without satisfactory success. One shaft yielded about four gallons to the minute, and another, which yielded the most, only nine. All of these wells were upon the land and premises of the Asbury Park Association. It became evident, and is manifest to the most casual observer, that these wells would not supply the volume of water needed. It was also manifest that the experiment to procure water by digging upon their own land had been quite reasonably extended, although not so complete as to satisfy the mind that they cannot obtain water on their own premises as well as elsewhere, since it is in evidence that there are two wells on their premises, sunk by individuals, which produce fifteen gallons each per minute, being as much in quantity as they procure from the well which is complained of.

Failing in their efforts upon their own premises they go elsewhere, on the land owned by individuals, and, procuring a right from individual owners, sink a shaft upon the public highway, near to the land of the complainants, and within five hundred feet of the complainants' well. This bore extended to the depth of four hundred and sixteen feet, within eight feet of the depth of complainants' well. At this depth they secured a flow of water at the rate of thirty gallons per

minute, and the supply from the complainants' well was almost immediately decreased from fifty gallons to thirty per minute. The diminution in water was immediately felt by many of those who depended for a supply from this source in Ocean Grove.

The Asbury Park authorities propose to sink other wells still nearer the well of the complainants. This bill asks that they may be prohibited from so doing, and that they may be commanded to close the well already opened, which, it is alleged, is supplied from the same source that the complainants' well is supplied from.

The complainants are first, in point of time. They are upon their own land and premises. They procure water from their own soil to be used in connection with their said premises, in the improvement and beneficial enjoyment of their occupation.

In this they have exercised an indefeasible and unqualified right. It matters not whether the water which they obtain is from a pond or underground basin, or only the result of percolation, or from a flowing stream. The defendants went from their own land upon the land of strangers, and obtained permission to bore for water, and there sink their shaft, procuring water from the same source that the complainants procured their water, and diverted it and carried it to their premises, three-eighths of a mile, for use.

Can they be restrained from doing this? A very careful consideration of a great many authorities leads me to the conclusion that they cannot at the instance of the complainants: Angell on Water-Courses, §§ 109-114, inclusive; Gould on Waters, § 280; Ballard *v.* Tomlinson, L. R. (26 Ch. Div.) 194; Chasemore *v.* Richards, 7 H. L. Cas. 349; 5 H. & N. 982; Acton *v.* Blundell, 12 M. & W. 324; Chase *v.* Silverstone, 62 Maine, 175; Roath *v.* Driscoll, 20 Conn. 533; Delhi *v.* Youmans, 45 N. Y. 362; Goodale *v.* Tuttle, 29 N. Y. 459; Wheatley *v.* Baugh, 25 Pa. St. 528; Frazier *v.* Brown, 12 Ohio St. 294.

The Courts all proceed upon the ground that waters thus

used and perverted are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and, consequently, are the absolute property of the owner of the fee as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure; these, when collected, interfere with his progress, and he may remove them, although the spring or well of the land-owner below be diminished or destroyed. So, the owner or owners of a bog, marsh, or meadow may sink wells therein, and carry off the water collected in them, to the use or enjoyment of a distant village or town, although the waters of a large stream upon the surface be thereby so diminished as to injure a mill-owner who had enjoyed the use of the waters of the stream for many years. Upon these principles there can be no doubt but that every lot-owner in Ocean Grove or Asbury Park could sink a well on his lot to any depth, and, in case one should deprive his neighbor of a portion or all of his supposed treasure, no action would lie. A moment's reflection will enable every one to perceive that such conditions or contingencies are necessarily incident to the ownership of the soil.

In the case before me there is no proof that the waters in question are taken from a stream, and I have no right to presume that they are. The presumption is the other way.

It seems to be my very plain duty to discharge the order to show cause, with costs.

Clark v. Conroe, 38 Vermont, 470.

BARKLEY *v.* WILCOX.

Court of Appeals, New York, 1881.

86 N. Y. 140.

ANDREWS, J. This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course, that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course because, in times of drought, the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of running water: Angell on Water-Courses, § 4; *Luther v. The Winnisimmet Co.*, 9 Cush. 171.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are, that the natural formation of the land was such that surface water from rains and melting snows would descend from different directions, and accumulate in the street in front of the plaintiff's lot in varying quantities, according to the nature of the seasons, sometimes extending quite back upon the plaintiff's lot; that in times of unusual amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land across the defendant's lot, and thence over the lands of others, to the Neversink River; that when the amount of water was small, it would soak away in the ground; that in 1871 the defendant built a house on his lot, and used the earth excavated in digging the cellar to improve and better the condition of his lot, by grading and filling up the lot and sidewalk in front of it, about twelve inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875 there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of

the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There is no natural water-course over the defendant's lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant, or usual, but occasional only. There was no channel or stream, in the usual sense of those terms. In an undulating country there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hillsides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions, water-courses. Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this State. It was referred to by DENIO, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great Judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this Court, although in none of them, it seems, was the question

before the Court for decision: *Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. The Mayor*, 76 Ib. 60. The question has been considered by Courts in other States, and has been decided in different ways. In some the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude: Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; Domat [Cush. ed.], 616; Code Napoleon, art. 640; Code Louisiana, art. 656. The Courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the Courts of Ohio and Missouri: *Martin v. Riddle*, 26 Pa. St. 415; *Kauffman v. Griesemer*, Ib. 407; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Ib. 158; *Ogburn v. Connor*, 46 Cal. 346; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181. On the other hand, the Courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs, or prevents, the surface water from passing thereon from the premises above, to the injury of the upper proprietor: *Luther v. The Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Ib. 106; *Bowlsby v. Speer*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Ib. 656;

Swett v. Cutts, 50 N. H. 439. It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State, in respect to surface drainage: Bentz v. Armstrong, 8 Watts & S. 40. And in Livingston v. McDonald, 21 Iowa, 160, the Court, in an opinion by DILLON, J., after stating the civil-law doctrine, say, that it may be doubted whether it will be adopted by the common-law Courts of this country, so far as to preclude the lower owner from making in good faith improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states that the prevailing doctrine seems to be that if for the purposes of improving and cultivating his land, a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed on to the first-mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do: Wash. on Easements, [2d ed.] 431.

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by DENIO, C. J., in Goodale v. Tuttle, is the one best adapted to our condition, and accords with public policy, while at the same time it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which flows in it. But each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream, by owners above and below him. Such use is in-

cident to his right of property in the soil. But he cannot divert, or unreasonably obstruct the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which, in civilized society, the waters of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual of the water in a natural water-course, or any unreasonable interruption in the flow. It is said that the same principle of following the order of nature should be applied between coterminous proprietors in determining the right of mere surface drainage. But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land, and his right in the water of a natural water-course. In such water, before it leaves his land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it by drains, or ditches, upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mill-owners or other proprietors on the stream. So, also, he may, by digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action: *Acton v. Blundell*, 12 M. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nolen*, 72 N. Y. 39. Now, in these cases there is an interference with natural laws. But those laws are to be construed in connection with social laws, and the laws of property. The interference in these cases with natural laws is justified, because the general law of society is that the owner of land has full dominion over what is above, upon, or below the surface, and the owner, in doing the acts

supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law: Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; *Miller v. Laubach*, 47 Pa. St. 54. But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property. Of course, in some cases, the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will, on the whole, best subserve the public interests, and is most reasonable in practice? For the reasons stated, we think, the rule of the civil law should not be adopted in this State. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots), are crossed by the depression. They must remain unimproved, if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands, to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circum-

stances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

All concur.

Judgment affirmed.

See *Adams v. Walker*, 34 Conn. 466.

WASHINGTON ICE CO. v. SHORTALL.

Supreme Court of Illinois, 1881.

101 Ill. 46.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was an action of trespass *quare clausum fregit*, brought in the Circuit Court of Cook County by Shortall, against the Washington Ice Company, for cutting, removing, and appropriating, in January and February, 1879, a quantity of ice which had formed over the bed of the Calumet River, within the limits of plaintiff's land, in Cook County. Defendant pleaded the general issue, and *liberum tenementum*. A verdict and judgment were rendered in favor of plaintiff for \$562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this Court.

On the trial, the patent from the United States to Lafrombois and Decant was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125.31 acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appears that the call of 125.31 acres contained in the patent required that the bed of the river should be included to make that quantity; that the Calumet River, extending from Lake Michigan westward past the plaintiff's premises, where it is between 165 and 200 feet wide, is in fact a navigable river; that the defendant company

owned ice-houses on its own property on the next lot east of plaintiff's, and that in operating on the ice it did not go on the plaintiff's land, save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The Court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attaching to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages, in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel—that is, as soon as it had been scraped, plowed, sawed, cut, and severed, and ready for removal. Defendant excepted to the giving of such instruction, and asked the Court to instruct the jury that a riparian owner on the banks of a river, navigable in fact, has no property in the ice formed in the midst of the stream, where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same, without cause of action or damage to such riparian owner, and that if such access as above stated had been gained, then at most, plaintiff could recover but nominal charges, even if the action of trespass be sustained—which was refused, and defendant excepted. The giving and refusing of instructions is assigned as error.

It may be well to inquire, first, whether plaintiff, as riparian proprietor on both sides of the Calumet River, is the owner of the bed of the stream within the limits of his land. By the common law, only arms of the sea, and streams where the tide ebbs and flows are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its centre, and the only right the public has therein is an easement for

the purpose of navigation. Chancellor KENT, in his Commentaries, declares it as settled that grants of land bounded on rivers or upon their margins, above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it: 3 Comm. 427, 428, Marg. And this title to the middle of the stream includes the water, the bed, and all islands: 2 Hilliard on Real. Prop. 92; Angell on Water-Courses, § 5.

This rule of the common law has been adopted in this State, and is here the settled doctrine. It was so held in *Middleton v. Pritchard*, 3 Scam. 510, and *Houck v. Yates*, 82 Ill. 179, with regard to the Mississippi River where it bounds this State; in *Braxton v. Bressler*, 64 Ill. 488, as to Rock River; *City of Chicago v. Laffin*, 49 Ill. 172, and *City of Chicago v. McGinn*, 51 Ill. 266, in regard to the Chicago River.

The Calumet River then been non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land. It is objected by defendant that water in a running stream is not the property of any man—that no proprietor has a property in the water itself, but a simple usufruct while it passes along; but manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

In *Agawam Canal Co. v. Edwards*, 36 Conn. 497, it is said: "The principle contained in the maxim, '*cujus est solum ejus est usque ad cælum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water—it is a usufruct merely—a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its

tributaries; and as each has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

In *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 191, SHAW, C. J., says: "The right to flowing water is now well settled to be a right incident to property in the land, it is a right *publico juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of Providence each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. . . . Still, the rule is the same, that each proprietor has a right to the reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes."

In *Rex v. Wharton*, 12 Mod. 510, HOLT, C. J., says: "If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land."

Hilliard states that a water-course is regarded in law as a part of the land over which it flows: 2 Hilliard on Real Prop. 100.

It will thus be seen that the riparian owner, as such, has rights with respect to water in a running stream—he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor as it passes along his land. The only opposing rights are such rights of the public, and such upper and lower proprietors. But when the water

becomes congealed, and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others. We are of opinion there is such latter right of use, and that it should be held property, of which the riparian owner cannot be deprived by a mere wrong-doer. When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? And we do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner.

In *McFarlin v. Essex Co.*, 10 Cush. 309, SHAW, C. J., remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common-law sense of the term—that is, in all waters above the flow of the tide—the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle or thread of the river."

The riparian proprietor has the sole right, unless he has granted it, to fish with *nets* or *seines* in connection with his own land: Angell on Water-Courses, § 67.

In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut River above the flowing

and ebbing of the tide, have an exclusive right of fishery¹ opposite to their land, to the middle of the river; and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft. So, too, sea-weed thrown upon the shore belongs to the owner of the soil upon which it is cast: *Emans v. Turnbull*, 2 Johns. 313.

The exclusive right in the owner to take the ice formed over his land, is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may with like propriety be recognized. It is connected with and in the nature of an accession to the land, being an increment arising from formation over it, and belonging to the land properly, as being included in it in its indefinite extent upwards.

Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consistent with legal policy, that such an article should be held a thing of common right, and left the subject of general scramble, leading to acts of force and violence. In reference to the rule which we here adopt, of assigning to the owner of a bed of a stream property in the ice which forms over it, we may well use, as fitly applying, the language of *HOSMER, J.*, in *Adams v. Pease*, *supra*, in speaking of the common-law rule as to the right of fishery, viz.: "The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner."

The views we hold are in accordance with the holding in *The State v. Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the

¹As to the right of fishery in this State, in riparian proprietors, see *Beckman v. Kreamer*, 43 Ill. 447, and cases there cited.

right to prevent its removal. See further, relative to the subject, *Myer v. Whitaker*, 55 How. Pr. Rep. 376; *Lorman v. Benson*, 8 Mich. 18; *Mill River Woolen Manufacturing Co. v. Smith*, 34 Conn. 462; *Brown v. Brown*, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxon v. Bresler*, above cited: "Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel, or soil, except as necessary to the enjoyment of the easement." The same is to be said as to the ice here. But it was not removed as necessary for the enjoyment of the public easement of navigation—it was for the purpose only of the appropriation of it for defendant's gain.

As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this Court in those cases: *Illinois & St. Louis R. R. and Coal Co. v. Ogle*, 92 Ill. 353; *McLean County Coal Co. v. Lennon*, 91 Ib. 561; *Illinois & St. Louis R. R. and Coal Co. v. Ogle*, 82 Ib. 627; *McLean County Coal Co. v. Long*, 31 Ib. 359; *Robertson v. Jones*, 71 Ib. 405.

Perceiving no error in the giving or refusing of instructions by the Circuit Court, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

For full discussion, see Cent. L. J., vol. 37, No. 18, p. 357.

PHILLIPS v. SHERMAN.

Supreme Judicial Court of Maine, 1873.

64 Maine, 171.

APPLETON, C. J. The defendant is the owner of a grist mill and privilege situate on a stream issuing from Hebron Pond in Monson. The evidence shows that in 1820, a dam and grist mill were erected at the outlet of said pond. In 1841, the then owner of the privilege rebuilt and enlarged the grist mill and deepened the channel thereto. Formerly fifty bushels of wheat and corn were daily ground at this mill. More recently the number has been reduced to a daily average of about twenty bushels. The consequence is that a much less quantity of water is now vented than formerly.

The plaintiff's mill and dam situated some distance below, on the same stream, was built in 1844. The defendant's privilege and dam have been occupied and enjoyed by him and those under whom he derives his title for a much longer period than is necessary to acquire an adverse title by prescription. Without detailing the evidence, we think it is satisfactorily proved that the defendant has all the rights which prior occupancy can give as well as those which can be acquired by prescription, so far as regards the height of his dam.

The defendant, then, has a right to keep and maintain his dam at its present height with all the water necessary to propel his machinery. But of this the plaintiff makes no complaint. The defendant claims the right to retain water not needed in any way for the use of his mill, nor necessary for its full enjoyment, and to the loss and injury of those whose mills are below him on the same stream.

The defendant, owning the privilege above, and being the first occupant upon the stream, has a prior right to all the water necessary to propel his machinery. But while this right is sustained and protected he must use the water in a reasonable and proper manner, having regard to the like reasonable use by all the proprietors above and below. He cannot un-

necessarily, and at his own will and pleasure, detain the water an unreasonable length of time, nor discharge it in such excessive quantity that it would endanger those below. Every owner of mills above is required so to use the water that every riparian proprietor below shall have the enjoyment of it substantially, according to its natural flow, but subject to the necessary and unavoidable interruption arising from its reasonable and proper use by the privilege above. It cannot be unnecessarily and wantonly detained. Each riparian proprietor on a running stream, whether above or below, has a right to the reasonable use and enjoyment of the water, and to the natural flow of the stream, subject to such disturbance and the consequent inconvenience and annoyance as might result to him from a reasonable use of the waters by others. The owner of a mill and dam has a right to the reasonable use of the water, but he must detain it no longer than is necessary for its profitable enjoyment, and then return it to its natural channel. A wanton or vexatious or unnecessary detention would render the mill-owner so detaining liable in damages to those injured by such unlawful detention: *Hetrich v. Deachler*, 6 Barr, 32; *Davis v. Winslow*, 51 Maine, 264; *Davis v. Getchell*, 50 Maine, 602. In all these cases the question is whether or not the use has been reasonable: *Thurber v. Martin*, 2 Gray, 396; *Pool v. Lewis*, 5 American Rep. (41 Ga. 162) 526; *Holden v. Lake Co.*, 53 N. H. 654; Washb. on Easements, 268; *Springfield v. Harris*, 4 Allen, 496.

So far as the defendant or those under whom he derives his title have by artificial means improved the stream, those improvements inure to the benefit of those below. The result is that the defendant has a right to use the water in his pond for the running of all the machinery upon his dam. He has a right to detain it when required for the reasonable use of his mill. His rights are prior and superior to those of the plaintiff. But he cannot be permitted, in mere wantonness, to detain water not to be used, and of which there is no need whatever in the running of his mill.

The question of reasonable use of the water is one of fact, to

be determined by the jury. The parties have referred that question to the Court. Upon the whole evidence we are of opinion that the defendant has unreasonably withheld water, neither necessary nor required for the use of his mill.

Accordingly, there must be judgment for the plaintiff for \$25 damages.

WALTON, BARROWS, DANFORTH, and PETERS, JJ., concurred.

Mitchell v. Warner, 5 Conn. 497; *Clinton v. Myers*, 46 N. Y. 511; *Moulton v. Water Company*, 137 Mass. 163.

THINGS ATTACHED BY NATURE.

TRIPP *v.* HASCEIG.

Supreme Court of Michigan, 1870.

20 Mich. 254.

GRAVES, J. The plaintiff in error sued Hasceig for the alleged conversion of a quantity of standing corn, which Tripp claimed as his property, and upon the trial a verdict passed for Hasceig. Tripp now brings error, and insists that the Circuit Judge erred in charging the jury, and he asks that the judgment be reversed therefor.

The evidence conduced to show that Tripp, being the owner of a farm in Kalamazoo County, on which he resided, and on which he had raised a field of corn in the season of 1865, conveyed the farm to defendant about the 13th of December, in the same year, by warranty deed, while the corn was still standing, unsevered, where it grew, and without inserting in the deed any exception or reservation; and that Hasceig took and appropriated a part of the crop as properly conveyed to him by the deed. It was claimed by Tripp on the trial that the crop, being over-ripe when the deed was given, did not pass by the conveyance, but the Circuit Judge advised the jury that the corn, though ripe and no longer deriving nourishment from the ground, would, if still attached to the soil, pass

by conveyance of the land ; and this is one of the rulings complained of.

We think this instruction was right, and we concur in the suggestion of the Circuit Judge—that whether the corn would pass or not, could no more depend upon its maturity or immaturity than the passage of a standing forest tree by the conveyance of the land would depend upon whether the tree was living or dead.

It is true that the authorities, in alluding to this subject, very generally use the words *growing* crops, as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground rather than to mark any distinction between *ripe* and *unripe* crops.

In some cases, where the question has been raised under the statute of frauds, as to the validity of verbal sales of unsevered crops, a distinction has been drawn between such as were fit for harvest and such as were not, upon the supposition that the former would not be within the statute, while the latter would be embraced by it. See cases referred to in *Austin v. Sawyer*, 9 Cow. R. 39. In *Austin v. Sawyer*, however, Chief Justice SAVAGE seems to have rejected the distinction, as he held that a verbal sale of *growing crops* was valid in New York.

But one case has been cited, or is remembered, in which it has been intimated that a mature and unsevered crop would, because of its being ripe, remain in the grantor of the land, on an absolute conveyance of the premises without exception or reservation ; and that is the case of *Powell v. Rich*, 41 Ill. 466, and the point was not essential to the decision there.

There are many authorities, however, opposed to the distinction suggested in that case : 2 Bl. Com. 122, note 3 ; Broom's Maxims, 354 margin.

In *Kittredge v. Woods*, 3 N. H. 503, Judge RICHARDSON cites *Wentworth*, 59, for the proposition that " when the land is sold and conveyed without any reservation, *whatever crop is upon*

the land passes," and, after stating that *ripe grain* in the field is subject to execution as a 'chattel, Judge RICHARDSON adds: "*Yet no doubt seems ever to have been entertained that it passes with the land when sold without any reservation.*" And in the case of *Heavilon v. Heavilon*, 29 Ind. 509, cited by plaintiff's counsel on another ground, the Court expressly admit that until severance the crop, as between vendor and purchaser of the land, is part of the realty. Indeed, the authorities are quite decisive that, whether the crop of the seller of the farm goes with the land to the purchaser of the latter, when there is no reservation or exception, depends upon whether the crop is at the time attached to the soil, and not upon its condition as to maturity. And this seems to be the most natural and most practical rule. When parties are bargaining about land, the slightest observation will discover whether the crops are severed or not, and there will be no room for question or mistake as to whether they belong with the land or not, if owned by the vendor.

If, however, the crops are to be considered as land or personal chattels, as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point.

It was further urged by plaintiff in error that if it should be considered that the corn would pass by the deed still the jury should have been allowed to inquire whether the parties did not enter into a contemporaneous verbal agreement, by which the grain was to belong to Tripp as part of the consideration for the farm. Without pausing to consider whether the plaintiff could be permitted to make the proof suggested, or could support his action by any arrangement like that supposed, it is quite sufficient to observe that there does not appear to have been any evidence fairly tending to show the existence of such an agreement. The plaintiff was himself on the stand, and yet he did not hint at the existence of a bargain of that kind.

It was finally insisted that the charge of the Court was

erroneous in stating that a subsequent agreement by the vendee, that the vendor should have the corn, would be void for want of consideration; and we are told that the error on this point is shown by the circumstance that there was enough to warrant the jury in finding that defendant was under an equitable obligation, to have the deed so reformed as to except the corn, and that this fact constituted a sufficient consideration for an agreement by Hasceig, that the crop should belong to Tripp.

This argument assumes that if the non-reservation of the corn in the deed was by mistake satisfactorily ascertained, or admitted, that then an equity would arise for the correction of the deed, which in turn would be an adequate consideration to support a subsequent agreement by Hasceig, that the grain should belong to Tripp. We need not examine the validity of this view, since it is quite manifest that the case contemplated by it is not found in the record before us.

The position taken implies that there was evidence before the jury to establish, according to the requirements of a Court of Equity, a mistake in the deed in not reserving the corn, and that there was also evidence conducing to prove a subsequent agreement that Tripp should have the corn, and resting for consideration on the right to have the deed corrected in equity.

There was a little evidence favoring the idea of a subsequent parol recognition by Hasceig of the right of Tripp to the corn under the conveyance of the land, but we look in vain for evidence of the assumed mistake in the deed.

It is well settled that to raise an equity to correct a deed there must not only be an error on both sides, but the mistake must be either *admitted or directly proved*: Adam's Eq. 171 margin; Fry on Specif. Per. 2d Am. ed., p. 312, top and note 11. The language of several of the cases cited by plaintiff's counsel is to the same effect. In *Kennard v. George*, 44 N. H. 440, the Court say that the mistake must *be clearly proved*. In *Canedy v. Marcy*, 13 Gray, 373, it is said that the Court has jurisdiction to reform a deed upon *clear oral evidence of the*

mistake, and in *Beardsley v. Knight*, 10 Vt. 185, the expression is still stronger. It is there declared that the Court will correct a mistake in a conveyance "*when undeniably proved*," and that "*unless it be so proved it will not interfere*." It is very certain that the record before us fails to show that a mistake in the deed was established on the trial below, or that any evidence was there introduced fairly tending to show that fact, and therefore, upon the theory of plaintiff's counsel there was no evidence of any consideration for a subsequent agreement by Hasceig that Tripp should have the corn.

The charge of the Court should be construed in the light of the evidence before the jury, and when viewed in this way we discover nothing of which the plaintiff can justly complain.

In order to preclude all misapprehension as to the scope of this decision, we deem it not improper to add that we express no opinion as to whether Tripp would be liable to Hasceig for any part of the crop appropriated by the former, with the acquiescence of the latter, under a verbal reservation.

The judgment of the Court below is affirmed, with costs.

CAMPBELL, C. J., and COOLEY, J., concurred.

CHRISTIANCY, J. I concur with my brethren in the opinion of my brother GRAVES; but had it appeared in the case that it was the custom of the country where the farm was situated (as it is in some of the Western States) to keep the ripe corn in the field for the winter, or till wanted for use or market, and to be taken only on the like occasions or for the like reasons, as if stored in the crib or granary, thus using the field merely as a substitute for such crib or granary, I am inclined to think I might have agreed in the opinion intimated by the Supreme Court of Illinois in *Powell v. Rich*, 41 Ill. 466, cited by my brother GRAVES.

Kittridge v. Woods, 3 N. H. 503; 49 Minn. 412.

NOTE.—In absence of debts crops go to the devisee as part of the land: *Dennett v. Hopkinson*, 63 Maine, 350; *Bradner v. Faulkner*, 34 N. Y. 347; *Green v. Armstrong*, 1 Denio, 550.

WILLIAMS REAL PROP. 13.

COCKRILL v. DOWNEY.

Supreme Court of Kansas, 1868.

4 Kan. 427.

BAILEY, J. This was an action for trespass, commenced before Alonzo Cottrell, J. P., by plaintiff in error, against defendant in error, to recover the value of three loads of wood, hauled from the land of the plaintiff in error, by the defendant in error, claiming triple damages under the provisions of ch. 208 of the Comp. L. The action was commenced on the 28th day of December, 1866, and, after several continuances, was tried by a jury, who found a verdict for the plaintiff. The defendant appealed, and the cause was again tried at the April term of the District Court of Marshall County, 1867, and judgment rendered for the defendant.

The plaintiff in error, who was also the plaintiff below, now brings the case to this Court to procure a reversal of the last-mentioned judgment.

It appears from the bill of exceptions that the defendant, Downey, and one Abraham Gossuck, were the former owners of the land on which the alleged trespass was committed, and that Gossuck and wife conveyed all their interest in the land to Caloni Walworth, by deed dated February 10, 1865, and that subsequently, on the 28th of August, 1865, defendant, Downey, conveyed all his interest in said land to Walworth, without any reservation whatever, and that said Walworth conveyed the land to plaintiff by deed of warranty, without reservation.

On the trial, the defendant filed no answer to plaintiff's petition on appeal, but offered himself as a witness to prove, with others, that there was a parol reservation of the dead and down timber in the deed from Downey to Walworth, and also in the deed from Walworth to plaintiff, Cockrill. Objection was made to this evidence, but the objection was overruled by the Court, and the evidence admitted. We think the Court erred in admitting the evidence. The policy of our laws, as evinced by the whole tenor of legislation as to registration of deeds and

the like, is to make titles to real estate depend upon the written deeds of the parties, leaving the smallest possible margin for patrol contracts, understandings, and reservations.

A deed of land must be, we think, deemed to involve all timber standing or growing on it, unless specially excepted. As to trees standing and growing in the soil, we apprehend that no question would be made; but a tree may be standing and not growing, or growing in a horizontal position, not standing.

Must the law apply a different rule in each case? Suppose the case of trees prostrated by a tornado, but with roots still adhering to the soil; shall they pass by the deed, or be reserved by parol? Obviously, such trees must be considered as part of the realty, and we think that there can be no safer general rule than that founded on the old maxim, "*Cujus est solum ejus est usque ad cælum*," which may, perhaps, be liberally translated: "The owner of the soil owns from the centre of the earth up to the sky." Various qualifications and limitations have been established as to fixtures, emblements, and the like; but we find no judicial warrant or authority for the claims of the defendant in this case.

The judgment must be reversed, and the case remanded for a new trial.

BRACKETT v. GODDARD.

Supreme Judicial Court of Maine, 1866.

54 Me. 309.

APPLETON, C. J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the

lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property, and may be seized and sold on execution: *Staples v. Emery*, 7 Greenl. 301. So, wheat or corn growing is a chattel, and may be sold on execution: *Whipple v. Tool*, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed: 2 Kent, 346, or by statute, as in this State, by R. S., c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser: *Goodrich v. Jones*, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard, with the intention of being replaced in the season of hop raising, are part of the real estate: *Bishop v. Bishop*, 1 Kenan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks RICHARDSON, C. J., in *Kittridge v. Wood*, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867, c. 88, defining the ownership of down timber. It would have

been otherwise had they been cut into logs or hewed into timber: *Cook v. Whitney*, 16 Illinois, 481.

The defendant, at the plaintiff's request, traveled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by statute.

Off-set allowed.—Defendant defaulted, to be heard in damages.

LINE TREES.

GRIFFIN *v.* BIXBY.

Supreme Court of New Hampshire, 1841.

12 N. H. 454.

PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended to adopt that line: *Allen v. Kingsbury*, 16 Pick. R. 235. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return: *Brown v. Gay*, 3 Greenl. R. 126; *Ripley v. Berry*, 5 Greenl. 24; *Esmond v. Tarbox*, 7 Greenl. R. 61; *Thomas v. Patten*, 13 Maine

R. 329; *Prescott v. Hawkins*, *ante*, 20, 26; and see 1 U. S. Dig. 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and acted with reference to that fact, which strengthens the case, and shows the propriety of the rule: *Jackson v. Ogden*, 7 Johns. R. 241; *Clark v. Munyan*, 22 Pick. R. 410.

As to the second question, in *Waterman v. Soper*, 1 Ld. Raym. 737, cited for the defendants, *HOLT*, C. J., ruled that if A plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B, next adjoining, A and B are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land.

But in *Co. Litt.* 200, b., it is said, "If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves."

And in *Cubitt v. Porter*, 8 B. & C. 257, it was held that "the common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted that for an entire destruction of the wall by one trespass might have been sustained.

Without going to the extent of the ruling in *LORD RAYMOND*, we are of opinion that a tree standing directly upon the line

between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other. See cases cited in *Odiorne v. Lyford*, 9 N. H. Rep. 511.

LYMAN *v.* HALE.

Supreme Court of Connecticut, 1836.

11 Conn. 177.

BISSELL, J. This writ of error is reserved for our advice; and the principal question raised and discussed is whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted that the tree stands upon the plaintiff's land, and about four feet from the line dividing his land from that of the defendant. It is further admitted, that a part of the branches overhang, and that a portion of the roots extend into the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on in the argument that the mere fact that some of the branches overhang the defendant's land creates such a joint ownership. Indeed, such a claim could not have been made with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. "Thus" (it is said) "if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance: 2 Roll. 144, l. 30; *Rex v. Pappineau*, 2 Stra. 688; *Cooper v. Marshall*, 1 Burr. 267; *Welsh v. Nash*, 8 East. 394; *Dyson v. Collick*, 5 Barn & Ald. 600; 7 Serg. & Lowb. 205; Com. Dig. tit., action on the case for a nuisance:

D. 4. And in *Waterman v. Soper*, 1 Ld. Raym. 737, the case principally relied on by the defendant's counsel, it is laid down : "That if A plants a tree upon the extremest limits of his land, and the tree, growing, extend its root into the land of B, next adjoining, A and B are tenants in common of the tree. But, if all the root grows in the land of A, though the boughs overshadow the land of B, yet the branches follow the root, and the property of the whole is in A."

The claim of joint ownership, then rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground the charge proceeded in the Court below ; and on this the case has been argued in this Court. We are to inquire, then, whether this ground be tenable. The only cases relied upon in support of the principle are the case already cited from Ld. Raymond, and an anonymous case from Rolle's Reports, 2 Roll. 255. The principle is, indeed, laid down in several of our elementary treatises : 1 Sw. Dig. 104 ; 3 Stark. Ev. 1457, n. Bul. N. P. 84. But the only authority cited is the case from Ld. Raymond. And it may well deserve consideration, whether that case is strictly applicable to the case at bar ; and whether it carries the principle so far as is necessary to sustain the present defense. That case supposes the tree to be *planted* on the "extremest limit"—that is, on the *utmost point or verge* of A's land. Is it not, then, fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line ? And in the case cited from Rolle, the tree stood *in the hedge* dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree ? We think not ; and, if it were, we cannot assent to it ; because, in the first place, there would be insurmountable difficulties in reducing the principles to practice ; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to

practice? And here it should be remembered that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained?

Again: if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportions do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriates all the products, on what principle is the account to be settled between the parties?

Again: suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line; and whether he can safely cut them, without subjecting himself to an action?

And again: on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those which, in our opinion, establish a contrary doctrine.

In the case of *Masters v. Pollie*, 2 Roll. Rep. 141, it was adjudged that, where a tree grows in A's close, though the roots grow in B's, yet, the body of the tree being in A's soil, the tree

belongs to him. The authority of this case is recognized and approved by LITTLEDALE, J., in the case of *Holder v. Coates*, 1 Moo. & Malk. 112; 22 Serg. & Lowb. 264. He says: "I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so."

The same doctrine is also laid down in *Millen v. Fandrye*, Pop. Rep. 161, 163; *Norris v. Baker*, 3 Bulstr. 178. See, also, 20 Vin. Abr. 417; 1 Chitt. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury in the Court below was on this point erroneous.

It is, however, contended that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged that land comprehends everything in a direct line above it; and, therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And, in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use: *Beardslee v. French*, 7 Conn. Rep. 125; *Welsh v. Nash*, 8 East. 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; 7 Serg. & Lowb. 205; 2 Phill. Ev. 138.

On the whole, we are of opinion that there is manifest error in the judgment of the Court below, and that it be reversed.

The other Judges ultimately concurred in this opinion;

WILLIAMS, C. J., having at first dissented, on the ground of a decision of the Superior Court in Hartford County (*Fortune v. Newson*), and the general understanding and practice in Connecticut among adjoining proprietors.

Judgment reversed.

Skinner v. Wilder, 38 Vt. 113; *Belyea v. Beaver*, 34 Barb. 547; *Dubois v. Beaver*, 25 N. Y. 122; *Hoffman v. Armstrong*, 48 N. Y. 201.

DEPOSITS BY FORCES AND PROCESSES OF NATURE.

GOODARD *v.* WINCHELL.

Supreme Court of Iowa, 1892.

52 N. W. R. 1124.

GRANGER, J. The District Court found the following facts, with some others not important on this trial: "That the plaintiff, John Goodard, is, and has been since about 1857, the owner in fee simple of the north half of section No. 3, in township No. 98, range No. 25, in Winnebago County, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. (2) That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. (3) That on the 2d day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north. (4) That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. (5) That on May 5, 1890, Hoag-

land sold the aerolite in suit to the defendant, H. V. Winchell, for \$105, and the same was at once taken possession of by said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. . . . (10) I find the value of said aerolite to be one hundred and one dollars (\$101) as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; and that a member of Hoagland's family saw the aerolite fall, and directed him to it." As conclusions of law, the District Court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by appellant that the conclusions of law are erroneous; that the enlightened demands of the times in which we live call for, if not a modification, a liberal construction, of the ancient rule "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil of a thing in itself personal makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit, "that of title by occupancy," and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody;" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, and supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules; and note, if at all, wherein the facts of this case should

distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title—that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables “found upon the surface of the earth or in the sea.” The term “movables” must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea, it is not difficult to understand what is meant by “movables,” within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about sixty-six pounds weight, that “fell from the heavens” on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature’s deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing “on the earth.” It was in the earth, and in a very significant sense immovable—that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as “un-

claimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the

scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as appellant is pleased to dominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of \$101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated

as such. It is said by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In the American and English Encyclopedia of Law (vol. 15, p. 388) is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Soc.*, 16 Alb. Law J. 76, and 13 Ir. Law T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meagre to indicate the trend of legal thought. Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the District Court is affirmed.

DANIELS v. POND.

Supreme Judicial Court of Massachusetts, 1838.

21 Pick. 367.

SHAW, C. J., drew up the opinion of the Court. Two questions arise in the present case, the first, as to the form, the second, as to the plaintiff's right of action.

1. The tenant in this case was tenant at will; and it seems a well-settled rule that if a tenant at will commits waste it is a determination of the will and an act of trespass, and that *quare clausum fregit* will lie by the reversioner: *Phillips v. Covert*, 7 Johns. R. 1; *Suffern v. Townsend*, 9 Johns. R. 35.

It was further contended that the plaintiff had not such a possession of the manure as would enable him to maintain trespass *de bonis asportatis*.

The plaintiff, by the purchase, had become owner of the farm with all its incidents, subject only to the tenancy at will of Nason. If the manure became the plaintiff's at all it was as part of and incident to the realty. Nason had a qualified possession of it for a special purpose only, that is, to be used upon the farm. The moment he sold it the act was an abandonment of that special purpose, he parted with his only right to the possession or custody of it, it vested in the plaintiff as owner of the freehold, and the right of possession followed the right of property: *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Walcott v. Pomeroy*, 2 Pick. 121; *Ayer v. Bartlett*, 9 Pick. 156. As the tenant's sale conveyed no title to the defendant, the action of trespass well lies against him if the property was the plaintiff's.

2. The Court are of opinion that manure made on a farm occupied by a tenant at will or for years in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with soil or other substances, is by usage, practice, and the general understanding so attached to and connected with the realty that, in the absence of any express stipulation on the

subject, an outgoing tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, for which the landlord may have redress; and such sale will vest no property in the vendee: *Lassel v. Reed*, 6 Greenl. 222; *Kittridge v. Woods*, 3 N. H. 503. The authority of the first of these cases is supposed to be impaired by a subsequent one decided by the same Court: *Staples v. Emery*, 7 Greenl. 201. But the Court do not profess to call in question the correctness of their former decision, but, on the contrary, affirm it and distinguish the latter case from it.

The rule here adopted will not be considered as applying to manure made in a livery stable, or in any manner not connected with agriculture or in a course of husbandry.

In the present case the defendant had notice, both from Blake and from the plaintiff, of the claim and title of the plaintiff to the manure before the sale; he therefore stands in the same situation with Nason, neither better nor worse.

Judgment for the plaintiff.

NOTE.—Though deposited by his own cattle and made from his own fodder, the tenant has no title to the manure made upon the leased premises in the usual course of husbandry: *Lassel v. Reed*, 5 Greenl. 222; *Lewis v. Jones*, 17 Pa. St. 262.

It passes with the land to the grantee by deed: *Kittridge v. Wood*, 3 N. H. 503; *Hill v. De Rochemont*, 48 N. H. 87; *Perry v. Carr*, 44 N. H. 118; *Brown v. Thurston*, 56 Me. 127; *Powell v. Rich*, 41 Ill. 466.

INGRAHAM v. WILKINSON.

Supreme Judicial Court of Massachusetts, 1826.

4 Pick. 268.

PARKER, C. J. The material facts upon which we are to decide this case are that the island in dispute between the parties is situated in Pawtucket River, where it is not navigable for ships or boats, and where the tide does not ebb and flow; that the plaintiffs are owners of a tract of land on the east side of the river, extending up and down the river be-

yond the island, and that the defendants are owners of a similar tract on the west side of the river; that the island is not held by any separate grant by either, nor does any other person claim it by virtue of any grant or by possession; and that both the plaintiffs and the defendants, and those under whom they severally claim and hold their farms on the main land, have occasionally cut trees on the island, but that no agricultural improvement has been made thereon. In a partition of the estate among the heirs of Ebenezer Bucklin, father of the grantor of the plaintiffs, this island was set off to those heirs in 1766, but it does not appear that any possession was taken or holden under the partition, except the occasional cutting of wood for forty or fifty years past. It appeared, also, that the defendants, or those under whom they claimed, had cut wood on the island for thirty years past at pleasure, without any objection having been made by those who held under Bucklin.

It is obvious from this statement that neither the plaintiffs nor the defendants had obtained such exclusive possession of the island, or any part of it as would enable either to maintain trespass against the other, without referring their possession to some title; and it is equally obvious that no title appears in either, except what may be derived from their property in the land on either side of the stream or river opposite to the island. And thus we are obliged to consider the rights of those who own the land on the banks of streams or rivers not navigable. And this depends altogether, we think, upon the principles of the common law, there being no statute of this Commonwealth, or of the province, nor ordinance of the colony, which alters the common law in this respect, except in relation to the fisheries, which having from the beginning been made the subjects of legislative care, must be governed by such rules and regulations as the several Legislatures have established.

The common law recognizes an important distinction, as to the use of waters and the property of the soil, between rivers or waters navigable and those which are not navigable. The

former invariably and exclusively belong to the public, unless acquired from it by individuals under grant or prescription. The latter are held to belong to those whose land borders on the waters; so that they have the exclusive right of fishing in front of their own land, and have a property in the bed or soil of the river under the water, subject, however, to an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience, or pleasure. This is called, in the civil law, a servitude, which is quite consistent with the right of property. The text-book from which this common-law principle is most generally deduced is Sir Matthew Hale's celebrated treatise, *De Jure Maris*, published in Hargrave's Law Tracts, p. 37, on recurrence to which it will appear that Hale referred to the ancient British writer, Bracton, for the foundation of his doctrine, and that he also relied upon the Roman civil law, as compiled in the Digest in the reign of Justinian. See Dig. lib. 41, tit. 1, *De acquirendo Rerum Domino*, leg. 7, 12, 29, 30, 38, 56, 65, and perhaps many others.

This public right in navigable waters and the soil or flats under them is changed by the colonial ordinance of 1641, which gives to the proprietors of upland bordering on such places the property of the soil down to the channel, unless it exceed the distance of one hundred rods, reserving still, however, to the public the right of passage over the water. But, according to judicial constructions of this ordinance, these flats may be occupied by wharves or other erections, provided the passage to lands above is not thereby too much straitened or obstructed: *Anc. Charters, etc.*, 148.

There appears, however, to be an important difference between the common and the civil law, in regard to the rights of the public and individuals, on this subject. By the former it would seem that the right of the king or the public is limited to those places, whether bays, coves, inlets, arms of the sea, or rivers, in which the tide ebbs and flows, this being the definition of navigable waters; whereas by the civil law all rivers properly so called, even above tide-waters, provided they

are navigable by ships or boats, or perhaps any other floating vehicle, are considered as public property; and so is the French law, as will appear by the Code Napoleon, liv. 2, tit. 1, c. 3, art. 538, in which are enumerated, among other subjects of public domain, *les fleuves et rivières navigables ou flottables*, which last word seems to have been coined to comprehend all streams on which boats, rafts, lumber, or any other species of property may be transported. It is probable that this distinction arose from the difference in magnitude between the rivers on the continent and those on the island, many of the former being navigable much beyond the ebbing and flowing of the sea, and few, if any, of the latter being of consequence for passage or transportation above the tide.

The common-law right of public property, restricted as it seems to be, except for easement or right of way, may be found very inconvenient in its application to many of the magnificent fresh-water rivers of the United States, which are navigable for small vessels and boats much above the flux of the tide, especially by the aid of steam power so rapidly getting into use. And on this account it has been decided by the Supreme Court of Pennsylvania that the public right to the bed of the river Susquehanna is the same as it is to the ports, harbors, etc., upon the sea; so that the proprietor of the banks could not extend his claim of property *usque ad filum medium aquæ*, as by the common law he would have the right: *Carson v. Blazer*, 2 Binn. 475. But the Supreme Court of New York felt themselves bound by the common law, and adjudicated accordingly in the cases reported in 17 Johns. Rep. 211, and 20 Johns. Rep. 90. And in a question relating to the fishery in the river Connecticut, one of the largest in the eastern part of the United States, the Supreme Court of Connecticut adopted the principles of the common law in regard to the extent of the property of borderers upon the river down to the *filum aquæ* or middle of the river: *Adams v. Pease*, 2 Conn. Rep. 481. In this Commonwealth the question has not directly arisen, except in regard to the fisheries, which are held to be the exclusive right of the owners of the banks of rivers, unless other-

wise appropriated by acts of the Legislature, this right being, according to our common law, held subject to the control of the Legislature, unless by particular grant or prescription it has been held free of that control.

With respect to the river now in question, however, and the part of it where the island in controversy is found, which is above tide-waters, and which we have a right to presume is not navigable even for boats, we think it clear that the common-law doctrine applies, giving to the proprietors of the banks the property of the bed of the river *usque ad filum medium aquæ*.

The question then arises, to whom belongs an island formed by a division of the waters of a river, where but for the island the borderers on the river would meet each other in the middle of the river? And this question must be settled by analogy to cases of a similar nature, which, though they may have arisen in other countries under the jurisdiction of the civil law, have nevertheless been adopted by the common law as fairly coming within its general principles.

The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line, the *filum aquæ* as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation cannot be questioned. "If the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one half will belong to the one lord, and the other to the other:" Hargr. Law Tr. 37. So by the civil law: Dig. lib. 41, tit. 1, § 29. "*Inter eos qui secundum unam ripam prædia habent, insula in flumine nata, non*

pro indiviso communis fit, sed regionibus quoque divisis; quantum enim ante cujusque eorum ripam est [tantum], veluti linea in directum per insulam transducta, quisque eorum in eo habebit certis regionibus." Although this seems applicable to several owners on the same side of the river, yet the principle must be the same when applied to the owners of the opposite sides, for it treats the river, as to the question of property in its bed, in the same manner as if no island was there. And so the compilers of the Napoleon Code consider it, who, without doubt, in most of that code, had reference to the civil law. The 561st article of the Code Napoleon, tit. 2, c. 2, is in these words: "*Les îles et atterrissements qui se forment dans les rivières non navigables et non flottables, appartiennent aux propriétaires riverains du côté où l'île s'est formée; si l'île n'est pas formée d'un seul côté, elle appartient aux propriétaires riverains des deux côtés, à partir de la ligne qu'on suppose tracée au milieu de la rivière."* Although these wise provisions seem to be confined to the case of islands recently formed, the same reason will extend them to the case of islands the origin of which cannot be traced, unless the property in them has been otherwise appropriated according to the rules of law; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show that it was created by a disruption from his land.

According to these principles, therefore, this island belongs in severalty to these borderers on each side of the stream, if their lands on the main are co-extensive with the island; if not, then the owners of the next adjoining lots will have a right to claim a portion of the island conformable to their lines. And this settles the present case in favor of the plaintiffs, for it appears that the bridge removed extended from their land to the island; the removal of it was therefore a trespass. But in regard to the trees cut down, it is not shown on which part of the island they stood; so that whether they belonged to the plaintiffs or to the defendants does not appear.

The verdict, being for the defendants, must be set aside, and a new trial granted.

Trustees of Hopkin's Academy v. Dickinson, 9 Cush. 544.

Alluvium, whether occasioned by natural or artificial means, belongs to the owner of the soil where deposited: *Lovington v. St. Clair County*, 64 Ill. 56.

Land formed by alluvium in a river belongs to the riparian owner of the fee: *Inhabitants of Deerfield v. Ames*, 17 Pick. 41.

WIGGENHORN et al. v. KOUNTZ.

Supreme Court of Nebraska, 1888.

37 N. W. R. 603; 23 Neb. 690.

MAXWELL, J. The defendant in error brought an action against the plaintiffs, in the District Court of Saunders County, to recover the value of certain trees cut down by, and converted to the use of, the plaintiffs in error. The defendant in error alleges in his petition "that from the 7th day of December, 1871, until the 29th day of November, 1882, he was the owner in fee simple and in the possession of lot one (1), in section 30, in township 13 N., of range 10 E., in Saunders County; that on or about the 1st day of September, 1881, and between that date and said 29th day of November, 1882, and while plaintiff was the owner and in possession of lot 1 aforesaid, the said defendants, Earnest A. Wiggenhorn, John Johnson, and Emery A. Clossen, unlawfully and with force broke and entered upon the plaintiff's said land, described as follows, as aforesaid, to wit: Lot 1, in section 30, in township 13 N., of range 10 E., of the 6th principal meridian, Saunders County, the State of Nebraska—and then and there cut down one hundred cottonwood trees belonging to plaintiff, and then growing on said land, and of the value of \$190, and carried the same away, and converted them to their own use, to the plaintiff's damages in the sum of \$190." Johnson filed an answer to the petition, in which he alleges, in substance, that

he was employed by Wiggenhorn to cut the trees in question, and that Wiggenhorn informed him that he had lawful authority to cut said trees. Wiggenhorn and Clossen answer jointly, denying the facts stated in the petition. On the trial of the cause, a verdict in favor of Kountz, and against all the plaintiffs in error, for the sum of \$25 was returned. A motion for a new trial was thereupon filed and overruled, and judgment entered upon the verdict. The testimony shows that, at the time stated in the petition, the defendant in error was the owner of lot 1, section 30, township 13 N., range 10 E. The land was entered prior to the year 1860, and a patent issued in that year, under which the defendant in error claims title. The lot in question is an island situated in the Platte River; there being a well-defined channel on each side of said island. In the year 1867, during high water in the Platte River, the upper part of said island was washed away, and, the testimony tends to show, formed an accretion to the lower end of said island. The timber in question was cut on the land thus formed at the lower end of the island. That sixty trees, from eight to fifteen inches in diameter, were cut on this land, and used as piles on Mr. Wiggenhorn's mill-dam, is proved beyond controversy. There is some dispute in the testimony as to whether Mr. Johnson was hired by Wiggenhorn, or sold him the piles; also whether Clossen was employed by Wiggenhorn or Johnson; but, in the situation of the case, the particulars as to the transaction are not material. All three participated in the trespass, and Mr. Wiggenhorn procured the trees, for which he claims to have paid to Johnson \$32. The proof shows that the trees, for the purpose for which they were used, were worth from \$2 to \$2.75 each. The principal defense relied upon is that the land on which the trees grew was not the property of Kountz, but was public land, to which all had equal rights; and it is claimed, further, that the land thus suddenly formed would belong to the parties owning the mainland bordering on the river near said island. These questions will be considered in their order.

In *Lammers v. Nissen*, 4 Neb. 245, Judge GANTT, in defining

the word "accretion," says: "That an accretion to land is the imperceptible increase thereto, on the bank of a river, by alluvial formations, occasioned by the washing up of sand or earth, or by dereliction, as when the river shrinks back below the usual water-mark; and, when it is by addition, it should be so gradual that no one can judge how much is added each moment of time; and, when the formation of land is thus imperceptibly made on the shore of a stream by the force of the water, it belongs to the owner of the land immediately behind it, in accordance with the maxim *de minimis non curat lex*. It is said that no other rule can be applied on just principles, for the reason that every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." In speaking of an avulsion, Washburn (3 Real Prop. 4th ed. 60) says: "Cases sometimes occur where considerable quantities of soil are, by the sudden action of water, taken from the land of one, and deposited upon or annexed to the land of another. The difference between avulsion, as the latter process is called, and alluvion, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other; and in the other, its being done suddenly, to an extent which can be ascertained and measured. In the case of avulsion, the soil still belongs to the first owner, unless he shall have suffered it to remain in its new possession until it cements and coalesces with the soil of the second owner, in which case the property in the soil will be changed, and no right to reclaim it remain." If it be conceded, therefore, that the land so formed at the lower end of the island in question was formed suddenly by washing the soil from the upper end of the island to the lower, the soil would still remain that of the owner of the island, and a person cutting trees on the land so formed would be liable for the same.

The plaintiffs in error strenuously contend, in substance, that as a grant of land on a stream not navigable includes all

islands or parts of islands between the shore and the centre thread of the stream, that, therefore, the land on which the trees grew belonged to the owner of the mainland on the river adjacent to such islands. There is no doubt of the rule that grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; the rule of the common law being that proprietors of land adjoining public rivers, not affected by the flow of the tide, own the soil *ad filum aquæ*: 3 Kent, Comm. 427. In *Ingraham v. Wilkinson*, 4 Pick. 273, the Supreme Court of Massachusetts says: "The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line—the *filum aquæ*—belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line—the *filum aquæ* as it is where the waters begin to divide. Such is the civil law; and the justice of this appropriation cannot be questioned. If the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one-half will belong to the one lord, and the other to the other." In *Trustees, etc., v. Dickinson*, 9 Cush. 548, it is said: "In the case just now supposed of an island arising in the middle of the river, it is divided by that line which was the thread of the river immediately before the rise of the island. But that line must thenceforth cease to be the thread of the river, or *filum aquæ*, because the space it occupies has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams are necessarily formed, by the original river dividing it into two branches. The island

itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a *filum aquæ* to each of these streams, while the old *filum aquæ* is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now, suppose another island formed in one of these branches, between the first island and the original main shore. It seems to us that it must be divided upon the same principle as the first; but, in doing it, it will be necessary to assume as the *filum aquæ* the middle line between the first island and the original river bank on that side." Where the mainland and an island have been separately surveyed and sold by the government to different parties, the grantees of the mainland do not, by such grant, acquire the island. In such case, the grant to each being separate and distinct, neither can claim beyond the calls of his entry and patent. The rule is that where there is a clear reservation of islands in a grant of mainland adjacent to a river, either expressly or by necessary implication, such islands do not pass to the grantee; and the *filum aquæ* which bounds the grant is the centre thread between the shore and the island. In such cases, two *fila aquæ* are established, one on each side of the island: *Stolp v. Hoyt*, 44 Ill. 223; *Trustees, etc., v. Dickinson*, 9 Cush. 544; *People v. Canal Appraisers*, 13 Wend. 355; *Buse v. Russell*, 86 Mo. 209.

In the case under consideration, it is clearly shown that there is a well-defined channel of the river on each side, between the mainland and the island. The grant of the mainland, therefore, would, at the most, merely extend to the centre thread of the stream between the shore and the island, so that in no event could an owner of the mainland claim an interest in the island.

Some objection is made that the evidence is not sufficient to

justify a verdict against Clossen. There is but little doubt that Mr. Wiggenghorn was the party wholly benefited by the cutting of the trees, and apparently he should be liable for the damage resulting therefrom. This question, however, cannot be determined in this action, as the motion for a new trial is joint. There is no error in the record, and the judgment is affirmed.

Woodward *v.* Short, 17 Vt. 387.

THINGS ATTACHED BY ART.

FIRST PARISH IN SUDBURY *v.* JONES *et al.*

Supreme Judicial Court of Massachusetts, 1851.

8 Cush. 184.

SHAW, C. J. The estate in controversy belonged to the town of Sudbury, when it was a corporation, having the functions both of a town and parish, prior to 1780; and after dividing and forming two distinct corporations, one municipal and the other parochial, the question is, to which it belongs. The general rule in this Commonwealth, to which, it is believed, the case of such double corporation of town and parish is peculiar, is, that if land is specially granted to a town, thus acting in a double capacity, either for municipal or parochial use, or if such a town specially, by vote or significant act, dedicates and appropriates a portion of its own territory to either the one or the other use, and it so remains until the separation, it will vest in the town or the parish, respectively, according as it shall have been originally so given, or subsequently appropriated to parochial or municipal uses. The difficulty usually is in applying this rule to particular cases, where, as in the present case, grants and acts are equivocal.

It appears that the original grant of this land, lying open and in common with a lot on which the meeting-house stands, and separated from such meeting-house lot by a traveled road

only, and not by any fence, was granted by one Haynes, more than a century ago, to the west precinct of Sudbury. The term "precinct," in law and in common acceptance, is used synonymously with "parish": *Inhabitants of Milford v. Godfrey*, 1 Pick. 96. The grant being to a parish, was *prima facie* evidence that it was granted for a parochial use. This would seem to be decisive but for one consideration, which is that the territory then (1740) constituting the town of Sudbury embraced a much larger surface, including another parish, since (1780) incorporated into a separate town, called East Sudbury, the name of which was subsequently changed by law to that of Wayland. The precinct of West Sudbury, therefore, at that time very nearly conformed in territory to that which, after the incorporation of East Sudbury, constituted the entire town of Sudbury. Still, however, it was not then a town. As a precinct, it had the functions of a parish only, although after the incorporation of East Sudbury the people of the same territory became a municipal corporation, and exercised the powers both of town and parish. The presumption, therefore, still remains, that the grant was made to the precinct for parish use.

Whether the corporation, after it acquired the functions both of town and parish, could have changed the appropriation of land granted to the parish, we have no occasion to decide, because we perceive no evidence of any intent to make such change. Certainly no vote to that effect appears, and we find no evidence of any decisive act. The use of it for a school-house to stand upon from 1735 to 1780 was whilst West Sudbury was a precinct or parish only, and before it became a town by the incorporation of the new town of East Sudbury. The continuance of the school-house on the same till 1798 seems to have been simply permissive, and without any act or vote; and it was then removed and placed on land of the town. The subsequent vote of the town, authorizing the replacing of the school-house on the land in question, was not a permanent appropriation to municipal use; and it seems not to have been so considered by the town, because, in eight or ten years after, and before the division of the corporation into town and parish,

the town again passed a vote authorizing the removal of the school-house to other acknowledged town land. There was no school-house or other town building upon it when the present parish was organized, by the separation of the two characters of town and parish.

The Court are of opinion that the original grant of this land by Haynes to the "precinct," impressed upon it a parochial character; that it retained that character, whilst the corporation exercised the functions of both town and parish; and that upon the separation it remained the property of the parish.

Judgment for the plaintiffs.

The case was then referred to an assessor, who made his report at the October Term, 1852, submitting to the Court the question whether the defendants had the right to remove the school-house from the premises, and if they had, assessing damages at thirty-five dollars; if they had not, then at one dollar.

Ingalls v. St. P., M. & M. Ry. Co., 39 Minn. 479.

WILLIAMS REAL PROP. 13.

MOTT v. PALMER.

Court of Appeals, New York, 1848.

1 N. Y. 564.

RUGGLES, J. In December, 1841, Mott conveyed to Palmer a farm of land in Columbia County by a deed containing the following covenant:

"And the said Philander Mott doth hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance."

This action was brought by Palmer, the grantee, on the covenant in the deed, to recover the value of a rail fence which stood on the land when the deed was executed, but which did not belong to Mott the grantor. The facts were, that the fence

was erected on Mott's land in 1840 by one Brown (who owned the adjoining land), under an agreement between him and Mott, by which Brown was to fence in, temporarily, a part of Mott's land with his own, and to cut and take away the grass growing on Mott's land ; with leave to take away the fence whenever he liked. After Mott conveyed to Palmer the land on which the fence stood, Palmer removed the fence and converted it to his own use. Brown thereupon sued him before a justice for the fence and recovered, Mott being a witness on that trial against Palmer. Although the evidence to prove these facts was at first offered by Palmer on the trial of this cause in the Court below and rejected by the Court, it was afterward given by the defendant Mott.

The question now is whether in this action brought by Palmer the grantee against Mott his grantor, on the covenant of ownership and seisin in the deed, Palmer is entitled to recover the value of the fence. A grantor who executes a conveyance of land undertakes to convey everything described in his deed ; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. The deed in question purported to "grant and convey all that certain lot or farm of land situate in the town of Chatham, County of Columbia, bounded, etc., with the appurtenances," etc. The word land, when used in a deed, includes not only the naked earth, but everything within it, and the buildings, trees, fixtures, and fences upon it: *Goodrich v. Jones*, 2 Hill, 143 ; *Walker v. Sherman*, 20 Wend. 639, 640, 646 ; *Green v. Armstrong*, 1 Denio, 554 ; *Com. Dig. Grant, E.* ; *Co. Litt.* 4 a ; 2 Roll. 265. A deed passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. Fixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed ; the deed conveys them to the grantee unless the reservation be in writing: *Noble v. Bosworth*, 19 Pick. 314. If the fence had belonged to Mott, it would have passed by his deed ; not by force of the word *appurtenances* contained in the deed, but without that word, and as part of the land. Trees, buildings,

fixtures, and fences on a farm, are corporeal in their nature, and the subjects of seisin, like the land itself of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is a loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and, therefore, it is that a building or fence belonging to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted.

But the earth within specified boundary lines may be owned by one man, and the buildings, trees, and fences standing on it by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another: *Shep. Touch.* 206; *1 Inst.* 48, b. And it is a corporeal inheritance: *10 Vin.* 202. Buildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord: *Holmes v. Tremper*, 20 *John.* 30; *Miller v. Plumb*, 6 *Cowen*, 665; *Doty v. Gorham*, 5 *Pick.* 489. *Herlakenden's Case*, 4 *Co. R.* 63, affords an instance in which one man owned the land and another the growing trees upon it. In *Rogers v. Woodbury*, 15 *Pick.* 156, *PUTNAM, J.*, in speaking of a house which a man had erected on land which did not belong to him, said "it might or it might not be parcel of the realty. If the owner of the land owned the buildings, it would be so. If he did not, and the owner of the building had no interest in the land, the

building would be personal property." *Smith v. Benson*, 1 Hill, 176, was the case of a dwelling-house and grocery belonging to one man, although standing on the land of another; and in *Russell v. Richards*, 1 Fairf. 431, the owner of land on which another man had erected a saw-mill by his consent, executed a deed for the land and the mill, but it was held that the conveyance passed no title to the mill, because it was the property of him who built it. The conclusion derived from these cases against the plaintiff's right of recovery on the covenant is that the defendant's deed purports to be a grant of real estate only, and the fence in question being personal property was not a part of the premises granted, and therefore not within the scope of the covenant which relates to the realty only.

If this be a sound conclusion, a grantor could not be made liable on the covenants in his deed, although he had previously and privately sold, with a view to removal, all the houses, buildings, mills, fences, and growing timber on the land conveyed. Indeed, if this doctrine prevails, the gravel, clay, stone, and loam might also be converted into personal property by such a sale, and carried off the land, without violating the grantor's covenant. Let us test the correctness of this conclusion in a few words. It is true the fence in one sense was not a part of the thing granted. It did not pass by the deed. In the same sense, if some stranger had been the owner of one-half of the farm, the half would not have been part of the thing granted because it would not have been passed by the deed. But the fence was *within the description* of the thing granted as clearly as the land itself; and being within the description, it was a part of that which the deed purported to convey, and of which the grantor covenanted that he was the owner. If it be yet doubted whether the fence (being in fact the personal property of Brown) was within the description of what the grantor professed to convey, that doubt can be solved in a moment, by reflecting that it would undeniably have passed by the deed if the grantor had been the owner of it; although it could not have so passed if it had not been within the description.

It all comes to this: The grantor undertook to convey it as

part of the realty by a deed which would have been effectual for that purpose if he had been the owner of it, as by the deed he professed to be, but was not. It is therefore a case in which the covenant of seisin affords a remedy; and although the amount in controversy is trifling, the right is clear; and it seems to be perfectly just that the grantor should pay for the fence, because there is nothing in the case to show that Palmer, when he accepted the deed, was informed by Mott or otherwise knew that it belonged to Brown.

The judgment of the Supreme Court must therefore be affirmed.

HUNT *v.* BAY STATE IRON COMPANY.

Supreme Judicial Court of Massachusetts, 1867.

97 Mass. 279.

FOSTER, J. There can be no doubt that the rails when laid upon the road-bed and fastened there so that engines and cars could pass over them would have become annexed to the realty, and ceased to be personal property, in the absence of any agreement changing the ordinary rule of law.

It was held in *Pierce v. Emery*, 32 N. H. 484, and *Haven v. Emery*, 33 N. H. 66, that rails delivered under an agreement that they should be laid down on a specific part of the railroad and continue the property of the vendors until a specified price was paid for them, remained the personal property of the vendors until payment, and were not, when laid, so inseparably annexed to and incorporated with the realty that they could not be removed for non-payment of the price. The agreement of the parties was held to supersede the general rule of law, and to be binding likewise upon subsequent mortgagees with notice. Notice to the trustees was held to be notice to the bondholders under such a mortgage. But without notice it was considered that the mortgagees would not be affected by a

private agreement changing the natural and legal character of the property from real to personal, but would have a right to suppose that they acquired all the incidents and appurtenances which by the general rules of law would result from such a purchase. We are satisfied with the principles and follow the authority of these cases: *Strickland v. Parker*, 54 Me. 263.

Our own adjudged cases fully support the position that the rails when laid became a part of the realty in the absence of any agreement to the contrary: *Peirce v. Goddard*, 22 Pick. 559; *Winslow v. Merchants' Insurance Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Richardson v. Copeland*, 6 Gray, 536. They likewise recognize the doctrine that buildings and other erections or fixtures so attached to the realty as to become ordinarily a part thereof may, by agreement between the parties, remain personal property: *Curtis v. Riddle*, 7 Allen, 185. Both of these propositions seem to be everywhere accepted as sound law.

Upon the question whether the character of property can be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be and by its ordinary nature is a part of the realty: *Elwes v. Mawe*, 3 East, 38; 2 Smith Lead. Cas. 99, and notes. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.

Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees, as well as all other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver. Land-owners having a lien upon the location for their damages and

a right to take possession for default of payment, stand in the same position so long as their right remains to enforce payment by entering on the land.

Whether the mortgage of the railroad, executed before these rails were laid, but then invalid, and afterward confirmed by the Legislature, should be treated as a security prior or subsequent to the laying of the rails, will probably not prove a material question in this case. By the agreement of the parties it must be sent to a Master to ascertain all the facts as to notice; upon the coming in of his report we can more conveniently and intelligently determine whether the agreement with Mr. Slater is still capable of being enforced.

It is valid between the parties, Slater and the original corporation, but binding upon prior mortgagees and the land-owners (if they remain entitled to possession as security for their damages), so far only as they have consented that the rails shall remain personalty. It is binding upon such subsequent incumbrancers and grantees as had notice of it when they acquired title, but upon no others.

PIERCE *v.* GODDARD.

Supreme Judicial Court of Massachusetts, 1839.

22 Pick. 559.

WILDE, J., drew up the opinion of the Court. This action is submitted on an agreed statement of facts, by which it appears that one Davenport, being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; that afterward he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed he, for a valuable consideration, sold the last mentioned lot and house to the defendant.

There are two counts in the declaration, one for the conversion of the newly erected house, and the other for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not therefore acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added, by right of accession; and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house cannot admit of a doubt; but it does not follow that the property in the new house vested in the plaintiff.

The rules of law by which the right of property may be acquired by accession or adjunction were principally derived from the civil law, but have been long sanctioned by the Courts of England and of this country as established principles of law.

The general rule is that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England, as well as by the civil law, a trespasser who willfully takes the property of another can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species, and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another: 2 Kent's Comm. 362; *Betts v. Lee*, 5 Johns. R. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law that

if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows not the owners but the builders: *Mol. de Jure Mar.*, lib. 2, c. 1, § 7.

Another similar exception is laid down by Chancellor KENT in his *Commentaries*, which is directly in point in the present case. If, he says, A builds a house on his own land with the materials of another the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them: 2 Kent's Comm. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said that if timber be taken and made into a house it cannot be reclaimed by the owner; for the nature of it is changed, and it has become a part of the freehold. In Moore, 20, it was held that if a man takes trees of another and makes them into boards, still the owner may retake them, but that if a house be made with the timber it is otherwise.

In Popham, 38, this principle is further extended. The plaintiff in that case had mixed his own hay with hay of the defendant on his land, and the defendant took away the hay thus intermixed; and it was held that he had a right so to do. But it was also held that if the plaintiff had taken the defendant's hay and carried it to his house and there intermixed it with his own hay, the defendant could not take back his hay, but would be put to his action against the plaintiff for taking his hay. If there be any doubt of the doctrine laid down in this case, it does not affect the present case. The doctrine laid down in the former cases is fully supported by the Year Books, 5 Hen. 7, 16; and I am not aware of any modern decision or authority in which this old doctrine of the English law has been controverted.

The case of *Russell v. Richards*, 1 Fairfield, 429, cited by the plaintiff's counsel, was decided on the ground that the building in controversy was personal property, and had never

become a part of the freehold. In the present case it cannot be questioned that the newly erected dwelling-house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport for the conversion of the new house. And it is equally clear that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down that house and using the materials in the construction of the new building was the tortious act of Davenport, for which he alone is responsible.

Plaintiff non-suit.

NOTE.—As to pews in a church being a part of the realty, see *First Baptist Church v. Bigelow*, 16 Wendal, 28; *Bigelow v. Biele*, 8 Barb. 130; *Union House v. Rowell*, 66 Me. 400.

FIXTURES.

1. TESTS.

PARSONS v. COPELAND.

Supreme Judicial Court of Maine, 1854.

38 Me. 537.

TENNEY, J. 1. The commission issued upon the judgment for partition under the seal of the Court. One of the persons appointed to make the division declined to act, and the Court designated another. This appears by the commission and the official certificate of the clerk thereon, and was in all respects sufficient authority to those appointed, in the discharge of the duties prescribed. The substitution of one commissioner for another did not annul the commission in other respects or impair its legal effect. After the substitution, the seal upon the commission was adopted, and applied equally to the person substituted and to those who were previously appointed and accepted the trust.

2. Another ground of objection to the acceptance of the report is that the commissioners set off and assigned to the petitioner property of which Calvin Copeland, the respondent, was sole seized in fee, and in which the said petitioner had no seisin in or possessory right.

The petitioner obtained twenty-three, of six hundred and twenty-five parts of the premises, under the levy of an execution in his favor against Calvin Copeland, on November 18, 1847. The petition for partition was presented to this Court and entered therein at October Term, 1849, in the County of Penobscot; and judgment for partition thereon was rendered at the October Term, 1852, of the same Court, and commissioners were appointed to make partition, who made their return and report on February 16, 1853, signed by them.

The case discloses, that after the levy of the execution and the filing of the petition for partition in Court, and before the interlocutory judgment, a dye-house and a dry-house with kettles and other articles therein; together with a wood-house, were erected on the premises by Calvin Copeland, for the purpose of carrying on the factory with greater facility and profit. It does not appear that the petitioner aided in the erection of these buildings, or that he consented or objected to their erection. These were taken into the estimation of the value of the premises by the commissioners, and the division made accordingly, though no part thereof were set-off and assigned to the petitioner, and the party who caused their erection is not deprived of them. But as they constituted a part of the appraised value of the whole, the value of the share set off to the petitioner was proportionately greater than it would have been if they had not been taken into the account.

If these buildings had been upon the land at the time the petition was filed, and no question had been presented in the proceedings, whether they were a part of the common property or not, the interlocutory judgment would have established the title in the petitioner to twenty-three parts of the six hundred and twenty-five, including the buildings in question. The commissioners would have had no authority to exclude any part of these buildings upon the land; and would not have been empowered to inquire whether they were erected exclusively by one tenant in common or not, with the view to disregard them in the division if it should be found that they were erected by one party alone before the filing of the petition. Under the commission they would have been bound to make division of the premises as they found them.

But the judgment for partition must be based upon the petition, and the estate therein described. It cannot include property not embraced in the petition, or which has not been added under such circumstances as to make it a part of the premises to be partitioned.

After a petition for partition has been filed in Court, and all the tenants in common of the land referred to therein have

had due notice of its pendency, if one should erect a temporary building thereon, for his own exclusive use, by the consent of his co-tenants, such building would belong to the party alone who erected it, in the same manner that it would, if placed upon the land of a stranger, under similar permission.

It cannot be assumed, from the evidence, that Calvin Copeland, being in possession of the premises as a tenant in common with the petitioner, who owned a small part only of the premises, erected the buildings in question wrongfully, so that they became a part of the common property. But from the description of the buildings and the mode in which they were attached to the ground, and the use for which they were apparently designed, according to the testimony, and the entire want of evidence that they were placed there against the consent of the petitioner, it may well be inferred that they were erected rightfully, and never became the property of the tenants in common. Consequently, it would seem to comport with the justice of the case, and with the equitable rights of all the owners of the premises, that the partition should be based upon an estimation of their value exclusive of those buildings, if it should be found by the commissioners that they were legally erected by Calvin Copeland for his own use and benefit, subsequent to the filing of the petition for partition.

For these reasons the report is recommitted.

3. Another ground relied upon against the acceptance of the report is, that the commissioners set off and assigned to the petitioner certain personal property belonging to said Copeland, to wit, machinery connected with a woolen factory, consisting of looms for weaving, carding machines, bands, water-wheel, fulling stocks and boilers, together with other personal property generally found in a woolen factory.

As the report is to be recommitted for reasons already stated, it is considered proper to discuss the question presented in the last ground of objection to its acceptance, and to decide the rights of the parties to the property referred to, so that the commissioners may be enabled to make their report in accordance with those rights.

It appears that one of the buildings upon the land described in the petition and the commission was a "woolen factory," in which were certain machines, such as are common in such a factory, consisting of cards, looms, jacks, spooler, picker and dresser, sitting upon the floor. The frames of the looms were fastened by cleats to prevent their moving. There were fastenings made *into* the floor, and the jacks and cards were fastened *to* the floor. And, as we understand from the report, this machinery was put in operation by means of water power connected with the factory.

On the question, whether such machines so situated are fixtures, so that they constitute a part of the real estate, the authorities are far from being uniform, and no rule of universal application can be deduced from them without conflicting with the doctrines found in some of the decisions upon the subject.

It was held in a leading case in England, *Elwees v. Mawe*, 3 East, 38, after much consideration, that there was a distinction between annexations to the freehold for the purposes of trade and manufacture and those made for the purposes of agriculture, and that the right of removal by the tenant of the former was much stronger than of the latter. And it may be regarded as well settled that an article may constitute a part of the realty, as between vendor and vendee, which would not under similar conditions and circumstances be so treated as between landlord and tenant: 2 Kent's Com., Lecture 35.

The same distinction exists between the rights of the heir and executor, in favor of the former; and between the tenant for life and the remainderman, or the reversioner. The rights of the mortgagee to such additions made by the mortgagor during his possession have been equally favored with those of a vendee: *Winslow et al. v. Merchants' Ins. Co.*, 4 Met. 306. The same rule will apply to fixtures under the levy of an execution as it does between vendor and vendee, passing them as parcels of the inheritance in one case as in the other: *Powell et ux. v. Manson & Brimfield Mfg. Co.*, 3 Mason, 459.

The case before us differs in some respects from the classes

of cases referred to, as this concerns the power and duty of commissioners in making division of real estate owned in common and undivided by the parties. By the judgment of partition each party is equally the owner of the premises, and has equal rights therein in the proportion determined thereby. Whatever was in the "woolen factory," situated upon the land described, and used in the appropriate business thereof, could not have been considered by the commissioners to be temporary for one party more than for the other, and therefore cannot fall within the principle applicable as between landlord and tenant. Hence it is a case where the doctrines which govern, as between vendor and vendee, are to have their most extended influence.

Still, if one party had placed in the factory certain articles, which were clearly personal in their nature, and under no rule became part of the realty, the commissioners were not at liberty to regard them in the division which they undertook to make.

It has been held necessary, in order to constitute a fixture, that the article should be let into, or united to the land, or to substances previously connected therewith: *Ames & Farrard on Fixtures*, 2. In *Walker v. Sherman*, 20 Wend. 636, it was held requisite that the article be actually affixed or annexed to the realty to become parcel thereof. By other authorities it has been regarded necessary in order to give to chattels the character of fixtures, and deprive them of that which they had before the relation to the realty commenced, that they be so firmly fixed that they cannot be moved without injury to the freehold by the process of removal: *Farrar v. Chauffette*, 5 Denio, 337.

It cannot be denied that the physical attachment of certain articles to the freehold is a very uncertain and unsatisfactory criterion. We have seen that it is well settled that the same attachment will not change the character of the article when made under one species of tenancy, when under another, with much less of a permanent connection, it will cause the article to become a part of the real estate. Millstones, the gear of the

mill, and the water-wheel to which the power is applied, and the articles connected which are universally conceded to be fixtures and to pass with the realty, may be taken from their appropriate places, without the withdrawing of a spike, a pin, or a nail, or the displacement of a cleat, their own weight often keeping them in their intended position, and no injury whatever arise to the building from which they are taken. Many articles, constituting essential parts of the most permanent dwelling-houses, and without which the buildings could not be comfortably occupied may be entirely removed with the greatest facility, and no injury be occasioned to the portions remaining.

Mr. Dane remarks: "It is very difficult to extract from all the cases as to fixtures, in the books, any one principle on which they have been decided, though being fixed and fastened to the soil, house or freehold, seems to have been the leading one, in some cases, though not the only one. Not the mere fixing or fastening alone is to be regarded, but the use, nature, and intention:" Abridg. of Amer. Law, vol. 3, p. 156.

In *Winslow et al. v. Merchants' Ins. Co.*, before cited, the Court say: "As to what shall be deemed fixtures and part of the realty, when the question does not arise between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. The rule that objects must be actually and firmly fixed to the freehold to become realty, or otherwise to be considered personalty is far from constituting such a criterion."

In *Teaf v. Hewett et al.* from the Ohio Reports, cited in the argument, where the Court came to the conclusion that machines in a factory are not parts of the realty, the learned Chief Justice, in a very elaborate opinion, says: "After a careful review of all the authorities I have reached the conclusion that the united applications of the following requisites will be found the safest criterion of a fixture. 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Applica-

tion to the use and purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the *structure* and *mode* of annexation, and the *purpose* and *use* for which the annexation has been made."

The intention is here held essential in the determination of the question, and so far the rule is not in conflict with the views entertained by the Court in 4 Met. The same Judge seems to consider the want of the first requisite as not entitled to controlling influences in all cases, for he remarks that "the doors, windows, shutters, etc., of a mansion-house may be raised and removed without any actual physical injury, either to the building or the article removed; so also in a mill with the millstones, hoppers, and belting apparatus as usually fixed in a mill, yet it has never been questioned that these articles are fixtures."

It is undoubtedly true that the second requisite quoted is important. It will not be contended that a machine fitted to be moved by water or steam power, portable in its character, when placed in a building (having such power for other and distinct objects) with the mere purpose of testing the capacity of such machine to perform the contemplated operations by the application of the power by the belts in previous use, would become a part of the realty by such experiment. Such was not the design, and such cannot be the legal effect.

But it is true, undoubtedly, that the building, the water-wheel and the gear designed for a grist-mill has peculiarities, and is often very different from the water-wheel, the gear, as well as the building intended to constitute parts of a woolen factory. And the machinery in the former, consisting of the millstones, the cleansing apparatus, the bolts, the belts with their appendages to carry the grain to the cleanser and the meal to the bolts, all of which are believed sometimes, if not generally, to be moved by means of the belts connected with the gear of the mill, together with the hoppers, the hoops,

troughs, etc., are as easily removed as are the cards, the looms, and the pickers in the latter. If the building is designed for a woolen factory, the wheels and gearing to which the motive power is applied, constructed in a manner suited to promote the intended object after the machines are placed in the building, it is only another step in the prosecution of the design; and it is not easy to understand wherein the latter fail to have the properties of the former, or how one can have distinguishing characteristics from the other, so that one is to be treated as personal property, while the other is real estate. A wheel in the gearing is moved by corresponding cogs in that wheel and the water-wheel. The wheel of a carding machine is caused to move by means of a belt connecting the wheel of the gearing therewith, or by means of another set of corresponding cogs. By what rule is it that the dividing line between the realty and the chattels shall be at one point or the other?

It is the supposed intention of a tenant for a limited time, in placing articles, which if made by the absolute owner would become part of the realty, to remove them at the expiration of his term, because such would be for his interest. This intention might be inferable, if the articles placed in a mill, which was rented for a term less in duration than that of the supposed existence of the articles themselves. But when the same articles are placed therein by the owner of the mill to carry out the obvious purposes for which it was erected, and which are in all respects suited therefor, and may be unsuited for another mill, it is difficult to see the reason of the proposition that these articles are still chattels in the hands of him who is the common owner of all, when in fact they are more permanently attached to the freehold than many things universally admitted to be parcel of the realty.

This Court have repeatedly held that certain articles, not differing materially in their general character in reference to the question which we have considered, ceased to be personal property when used in connection with the real estate for the purpose designed in an appropriate manner: *Farrar v. Stack-*

pole, 6 Greenl. 154; *Trull v. Fuller*, 28 Me. 545; *Corliss v. McLagin*, 29 Me. 115. No reason is perceived for withdrawing the present case from the doctrines of those previously decided, especially as authorities in other States fully sustain the views here taken, although in others, Courts of the highest standing have come to different conclusions.

Report of the commissioners recommitted.

Teaff v. Hewitt, 1 Ohio St. 511; *Quinby v. Manhattan Club & Paper Co.*, 24 N. J. Eq. 260.

TESTS APPLIED.

MEIGS'S APPEAL.

Supreme Court of Pennsylvania, 1869.

62 Pa. St. 23.

AGNEW, J. The plaintiffs' bill evidently proceeded on the ground of title. Its purpose was to restrain the agents of the United States from removing the buildings erected on the public common of York for military barracks and hospitals. These structures being put up by the United States for military purposes, and built of their own materials, the title to the materials must have been lost to the United States and vested in the plaintiffs before an injunction would be issued to restrain their removal. Hence the plaintiffs assume that, by the act of the United States, the buildings were annexed to the freehold, and thus the title to the materials passed out of them, and vested in the borough of York as trustees of the title to the common. The buildings were chiefly set upon posts let into the ground, and, therefore, the argument of the plaintiffs maintains that the question of fixture or not a fixture depends, not on the character of the foundation, but always on the question whether it is let into the soil. This is the old notion of a physical attachment, which has long since been exploded in this State. On the contrary, the question of fixture or not depends on the nature and character of the act by which the

structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. This subject has been so fully discussed in the recent case of *Hill v. Sewald*, 3 P. F. Smith, 271, it is unnecessary to repeat what is there said.

The true question then is, Were these structures of the government incorporated into the realty? We think they were not, and this is manifested by the entire character of the transaction, and the attending circumstances. And in the first place it was not the intention of either party that they should be annexed to the freehold. Evidently the authorities of the borough of York cannot be presumed to have so intended. The grant from the proprietors of Springettsbury Manor to the burgesses and inhabitants of York of twenty acres of land was—"to be kept as an open common forever for the use of said borough, and to and for no other use, intent, or purpose whatsoever." The borough authorities had no power to assent to such erections as permanent fixtures, and it was, therefore, clearly their duty to prevent their erection, if intended as such. Having made no objection and taken no steps to prevent it, they are entitled to the more favorable construction of their acts, that they knew and believed they were only temporary structures for a casual purpose.

As to the United States, the emergency and all the acts and measures of the government show that these were not permanent buildings, to be occupied at all times, but were mere temporary structures, to be used during the continuance of the war or so long only as the necessities of the government made this location convenient for military purposes. It is very evident the United States intended no annexation to the freehold.

The nature and character of the structures are also to be considered. They were not improvements made for objects connected with the soil—neither intended to give value to it nor to receive value from it. Their purpose was not different from that of the tents spread for the accommodation of the army, or its board huts used for winter quarters, the only real

difference being that these structures were intended for greater comfort, and a longer occupancy of the location.

The act is distinguishable from that of an ordinary trespasser. There was no intent to improve the ground, or to make it accessory to some business or employment. It was not an assertion of title in the soil, or of an intention to hold an adverse possession. Indeed, there was not a single element in the case which characterizes the act of a tort-feasor, who annexes his structure to the freehold, and is therefore presumed to intend to change the nature of his chattel and convert it into realty, and thereby to make a gift of it to the owner of the freehold. Neither the borough nor the United States looked upon the act in that light. The United States intended no dedication of the materials to the borough, and the borough expected none.

Herein it is that in equity the same principles apply that lie at the root of an estoppel. It is not estoppel in the ordinary sense which prevents an owner from claiming his own property, because he has done that which shuts his mouth to declaring his title. These materials never were the property of the borough, and, therefore, as owners, they had no title to be estopped of. But the borough, by lying by and suffering the United States to put up the structures without objection, on a public common, where, as permanent buildings, they would be nuisances, is estopped from declaring that the United States intended to annex their chattels to the freehold—from asserting that they were mere tort-feasors, to be treated as presumptively dedicating their property to the public. This, however, is the pivot on which the right to an injunction turns. The plaintiffs must convince us that in law and equity the United States have lost their title, notwithstanding neither party intended there should be a gift of the chattels. They must stand in the attitude of one entitled in equity to appropriate these structures, and of whom it must be said he has done nothing to mislead or to encourage a belief that he has assented to the act. A license to use the land of another temporarily may be inferred from circumstances. Thus, a neighbor who enters to pay a visit cannot be treated as a trespasser. So a guest who enters an inn,

or one who moors his vessel at a private wharf, to do business with the owner. And even a permanent right to the use of structures built on the land of another with his assent, may be acquired by the expenditure of money and labor: *Lefevre v. Lefevre*, 4 S. & R. 241; *Rerick v. Kern*, 14 S. & R. 267. And it is said in *Cook v. Stearns*, 11 Mass. 533: "Licenses to do a particular act do not in any degree trench on the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an *excuse* for the act which *otherwise would be a trespass*." See also notes to *Rerick v. Kern*, 2 Am. Lead. Cases, 514. There is nothing in the case to show express license, but the circumstances bear strongly on the silence of the plaintiffs when they should have spoken out. The United States were engaged in a gigantic war, requiring all its means and the encouragement of all good citizens to suppress the opposition to their welfare and authority. Troops were constantly required to be raised and disciplined. York was within the theatre of war, and needed protection, the enemy coming up to her very door. Battles were fought near by, and none more than the citizens of York needed that the government should use all the means and appliances of war to preserve their lives and property. Can it be tolerated that now, when the enemy is defeated, and war is no more, that these citizens should claim the very property the government had used as a part of the means necessary to their protection? If equity has a conscience, it must revolt at this return for the services thus rendered by the common government.

This is an application to a Court of Equity to use the arm of the law to restrain an unlawful act, on the ground that the removal of these buildings is an irreparable injury. But surely this is not such a case. There is not any evidence that the United States have dedicated this property to the citizens of York, or that they have done any act which can justly forfeit their title to the property; and it is not the province of a Court of Equity to enforce penalties and forfeitures. It is not necessary to invoke the power of eminent domain in this case, or

any doctrines of necessity to override the rights of property. Equity will not interfere in such a case independently of these considerations.

The *pro forma* decree of the Court below is reversed, and the plaintiffs' bill is dismissed at their costs.

Lake Superior Ship Canal Ry. & Iron Co. *v.* McCann *et al.*, 48 N. W. Rep. 692.

LINAHAN *v.* BARR.

Supreme Court of Connecticut, 1874.

41 Conn. 471.

CARPENTER, J. The sole question in the first case is, whether a tenant who erected a building on leased property had a right to remove the same at the termination of his lease. The circumstances were these: The premises consisted of a store in the city of Bridgeport. The store burned down, leaving a vacant lot. The lease had then about two years to run. The landlord offered the tenant fifty dollars to surrender his lease, but he declined, saying that he was about to erect another building on the land, that he knew that it would belong to the landlord, that he did not intend to remove the same at the expiration of his lease, and that the rent which he should receive during the term would pay the cost of construction. The building was one story high, built of brick, with glass front, and stood on the foundation walls of the burned building, except the rear, which was an unbroken brick wall from the cellar bottom.

The respondent claims under the lessee, and insists that the building was a trade fixture which might lawfully be removed by the tenant.

A question is made whether the declarations of the tenant were admissible in evidence. We entertain no doubt on that question. They tend directly to show the intention of the party in erecting the building; and intention in these cases is

always a material inquiry. Had the parties agreed that the tenant might build and remove the building, no one would doubt that that fact might be shown for the purpose of proving that it was the personal property of the builder. The intention and understanding of the parties at the time are necessarily involved in the inquiry.

In this case it is apparent that both parties intended that the building, at the termination of the lease, should belong to the owner of the land. This is evident, in the first place, from the materials used, and the manner of construction. It was attached to the freehold in the same manner that buildings ordinarily are which are designed to be permanent. This, although not conclusive, is an important consideration. In the next place, the interview between the parties at the time very clearly shows that neither party expected or intended that the building should be removed. In view of all the circumstances we think the Court below was clearly right in holding that the building was a part of the realty: *Ombony v. Jones*, 19 N. Y. 324; *Shepard v. Spalding*, 4 Met. 416; *Curtis v. Hoyt*, 19 Conn. 154; *Landon v. Platt*, 34 Conn. 517; *Capen v. Peckham*, 35 Conn. 88.

The second case was a summary process to recover the possession of the leased premises. The only question before the Justice seems to have been whether the plaintiff in error, who claimed the building by purchase from the original lessee, was the lessee of the complainant. The Court found that he was, and rendered judgment against him.

We fail to discover any question of law in the case which this Court can review.

The defendant claimed that the occupation of the premises while he was claiming the ownership of the building and while the injunction against his removal of it was in force, was not an acceptance of a proposition by the plaintiff to lease the premises to him at a certain rent named. The Justice found that he had become a lessee of the premises—that is, that his conduct was such an acceptance.

This was a question of fact. But even if it can be regarded

as a mixed question of law and fact, we cannot see that the Justice violated any principle of law in deciding as he did.

There is no error in either judgment.

DOOLEY v. CRIST.

Supreme Court of Illinois, 1861.

25 Ill. 551.

WALKER, J. Appellee claims the building in controversy under his purchase, at the constable's sale, on the execution against Whitelock and Philips. On the contrary, appellant claims it as a part of the real estate of which he was the owner. This then involves the inquiry whether it was real or personal property. It is a fundamental rule that real estate embraces lands, tenements, and hereditaments. All improvements or additions of a permanent nature and adapted to its use and better enjoyment, placed upon land, are regarded as forming a part of the land. To this rule there are the exceptions of trade fixtures, which cannot have any application to this case. By express agreement between the parties, erections placed upon the land by the tenant during the term may be removed as personal property; or if the owner of the soil were by deed to sell a tenement erected upon the land, it would no doubt become dissevered, and converted from real to personal property. But as a general rule, when a building is erected on land, the presumption is that it is a part of the real estate and not personal property, and to take it out of the operation of the rule, a state of facts must be shown which rebuts the presumption. Even when a stranger constructs a building upon the land of another, without his consent, it becomes a part of the land, and he would become a trespasser by removing it.

This record affords no evidence from which it can be inferred that the appellant, who was the owner of the soil upon which this building was erected, ever consented that it might be

removed. He had contracted to sell the land to Mrs. Philips, but that agreement was afterward rescinded, and when the contract was abandoned by the parties, appellant became undeniably the owner of the land and its improvements, but in law and equity, as no reservation seems to have been made of the house or other improvements. When Whitelock agreed with Philips for the purchase of the acre of land upon which the house was built, and which was embraced in Mrs. Philips' purchase, there seems to have been no reservation or agreement for the removal of the house in any event. Whitelock gave an acre of the land, purchased of appellant, in exchange for the acre upon which the house was erected, and they each entered into possession of the portion thus received in exchange, and so continued until their several contracts were rescinded or abandoned, neither having paid for the land purchased of appellant. This building was a part of the improvement connected with Whitelock's purchase, and it must have been made with the design of permanently remaining on the land, and not for any temporary purpose.

If the intention of Whitelock was to render the improvement permanent when erected, there can be no question that it became a part of the freehold, and no subsequent change of intention changed its character to that of personal property, rendering it liable to levy and sale on an execution from a justice of the peace. The intention at the time to render it a part of the realty fixed its character beyond all dispute, and that character could not be changed by anything short of its severance by removal or by an executed agreement for that purpose. The mere change of the intention of the owner cannot have that effect. This principle was announced by the first of appellant's instructions, in the series which the Court refused to give, and it should have been given. The Court below having erred in refusing to give that instruction, the judgment below must be reversed, and the cause remanded.

Judgment reversed.

HILL v. WENTWORTH.

Supreme Court of Vermont, 1856.

28 Vt. 428.

BENNETT, J. This is a case of very considerable practical importance, and we have endeavored to give it the attention which its importance demands. The charge assumes that, if the machinery in the mill was necessary and usual for the purpose of manufacturing paper, and designed to be and remain in the mill permanently, it became a part of the realty, however slightly it may have been attached to the freehold. There are, no doubt, cases in the books which will fully warrant the charge of the Court, and of that character is the case of *Farrar v. Stackpole*, 6 Greenl. 157, to which we have been referred (and which seems to be an extreme case), while others take an opposite view, and hold that the *annexation* must be substantial, and such that the chattel cannot be severed without substantial injury to the freehold, beyond what shall result from the abstraction of the thing removed. The first inquiry should be, what has been the tendency of our own decisions in relation to the matter?

In *Wetherby v. Foster*, 5 Vt. 136, it was held that potash kettles, set in brick arches, in the usual manner, with chimneys to the arches, and used in manufacturing purposes, still remained personal property. The Court said, p. 142, if the kettles were fastened to the freehold at all, it was temporary merely, and the injury to the brick-work, in taking them out, *was too trifling to designate them real estate while there*. In *Tobias v. Francis*, 3 Vt. 425, the question arose between the mortgagee and a creditor of the mortgagor, and it was held that carding machines, in a woolen factory, and connected by a band with other wheels in motion, by which they were propelled in the usual way, and which remained stationary by means of their own weight, were still personal property, and, as such, might be attached and taken away.

In *Sturgis v. Warren*, 11 Vt. 433, the question also arose be-

tween the creditors of the mortgagors and the assignee of the mortgagee, and the carding machines were affixed to the factory building in the usual manner, *some with nails, some with spikes and screws, and some with cleats*, and yet, upon the authority of the case of *Tobias v. Francis*, they were held to be personal property. In *Cross v. Marston*, 17 Vt. 534, the case of drawers, and the sash case were placed in a building which was fitting up for a book store. The case of drawers was nailed to the wall, and open shelves were placed in the space above. The sash of the show-case was used to cover an open book-case, which was permanently fastened to the wall of the building—the sash sliding in a place before the book-case, and being fastened in by strips of boards nailed above and below. The question arose between vendor and vendee, and the case was made to turn on the question whether the chattels had, by the manner of their *annexation* to the freehold, lost their *personal identity as chattels*, and it was held that they had not, the Court applying, *as a test*, the fact that the articles could have been taken out of the building without injury to themselves, or the building, which was assumed both by the counsel and the Court, although, from the report of the case, I do not see that it was a fact distinctly found in the bill of exceptions. From the cases already decided in this State, upon a subject which, from its very nature, is perplexing, and rendered more so by the conflicting views of different Courts, it is quite evident our Courts have assumed the ground that a chattel is not to lose its personal identity, as such, unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it, without material injury to itself or to the freehold. We apprehend there is no sufficient reason why we should, at the present day, recede from the ground already taken by our Courts. It is certainly sustained by many well-considered cases.

In *Swift v. Thompson*, 9 Conn. 63, the spinning frames in a cotton factory stood upon the floor, and were kept in their place by means of cleats nailed to the floor around them, and there was other machinery, to the posts of which iron plates

were attached, through which wood screws passed, fastening them into the floor, but by unscrewing them the machinery could be removed without injury to it or the building, and it was held that the whole machinery remained personal property. DAGGETT, J., says it is material to consider that the machinery was thus attached to the building to render it stable, and that the criterion established by the rules of the common law is, *could this property be removed without injury to the freehold?* See, also, *Taffe v. Warwick*, 3 Blackford, 111. The New York cases are very full on this point: *Cresson v. Stout*, 17 Johnson, 116; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Chauffetete*, 5 Denio, 527, and *Vanderpool v. Van Allen*, 10 Barbour, 157. So in a recent case in Ohio, *Teafft v. Hewett et al.*, 1 Ohio N. S. 5-11, where the subject was examined at great length, and with ability, it was held that the machinery in a woolen factory, connected with the motive power of the steam engine by bands and straps, and only attached to the building by cleats or other means to confine it to its proper place for use, and could be removed without injury, was but chattel property. The case of *Gale v. Ward*, 14 Mass. 352, in its facts, is much like the case of *Tobias v. Francis*, in our own reports. In that case, PARKER, C. J., says, *though in some sense attached to the freehold, yet they (the machines) could easily be disconnected, and used in buildings erected for similar purposes.*

Upon the subject of fixtures, in the English law, the case of *Elwes v. Mawe*, 3 East, 38, and reprinted in Smith's Leading Cases, may well be considered *the leading case*. In that case, and in the notes to it by Mr. Smith, and the American editor, most of the law on that subject is collected.

In a case decided in the Court of Exchequer, in 1851, *Hellawell v. Eastwood*, 6 Welsby, Hurlstone & Gordon, 295, it was held that machinery, consisting of certain cotton spinning-machines, some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them, were still personal property. B. PARK said the only question was, whether the machines, when fixed, were a parcel

of the freehold, and this was a question of fact depending on the circumstances of each case, and principally on the two considerations, first, the mode of annexation to the soil or fabric of the house, and the *extent* to which it was united to them, whether it could be easily removed without injury to itself or the building ; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*.

He added, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal, without the least injury to the fabric of the building, or to themselves ; and the object and purpose of the annexation was not to *improve the inheritance*, but merely to render the machines steadier and more capable of convenient use, *as chattels*. In that case, it is true, the question arose between landlord and tenant, and in such a case, it is said in the English law, the greatest indulgence is shown to the tenant, where the annexations are made for the purposes of trade or manufactures. No doubt in England, in relation to fixtures, different rules have been held to prevail ; and between heir and executor, a strict rule has been adopted, and the same rule seems to have prevailed between vendor and vendee, and between mortgagor and mortgagee ; and the English cases show that there is no relaxation of the rule, as applied in these latter cases, even between landlord and tenant, where the erections are made *solely for the purposes of agriculture*, although beneficial and important in improving the occupancy of the estate. We apprehend that much of the confusion in the authorities upon the subject of fixtures, may have had its origin in the fact that different rules have been attempted to be applied to different relations, and these different relations have sometimes been lost sight of.

It is said by COLLAMER, J., in *Sturgis v. Warren*, 11 Vt., that "in this State, and especially under our attachment law, it is difficult to recognize any such distinction."

In *Dubois v. Shelley et al.*, 10 Barb. 496, it was held the

same rule should be applied, as to fixtures, whether the erections were for agriculture and other purposes, or for the purposes of trade, and between landlord and tenant.

In *Van Ness v. Pacard*, 2 Peter's U. S. R. 145, it is strongly intimated that, in this country, there should be no different rule applied, whether the erections were made for *the purposes of trade and manufactures*, or purely for *agricultural purposes*.

We think the rule in this State should be that the various articles of machinery belonging to a manufactory are, in no respect real estate, excepting as they are a part of the freehold, or substantially attached to it, and that it is not sufficient to make them a part of the freehold if they are attached to the building for the purpose, and in the manner adapted to keep them steady, and that their use may be more beneficial as chattels, and in such a way that will admit of their removal without any material injury to the freehold, or to the chattels. Neither is it enough to make them real estate that they are essential to the occupation of the building for the business carried on in it. In the construction of a building, many things, which in themselves are chattels, as doors, window-blinds, shutters, etc., become a part of the building, and, in such cases, the manner of annexation is of no particular importance. But to make the *test*, whether fixture or no fixture, to be found in the relation which the chattel bears to the use of the freehold, is, to us, unwise, and against well-considered cases. The rule requiring *actual annexation* is not affected by those cases where a *constructive annexation* has been held sufficient. Those cases may be regarded as exceptions to the general rule, or else as cases where the *things* were *mere incidents* to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture.

In determining the character of what the plaintiff claims to be *fixtures*, or a part of the realty, we must not only have reference to the manner and extent of the annexation, but also to the *object* and *purpose* of it. Whether the articles in question were personal property, or *fixtures*, should be determinable, and plainly appear, from an inspection of the property itself, tak-

ing into consideration their *nature*, the *mode* and *extent* of their *annexation*, and their purpose and object, from which the *intention* would be indicated.

To change the nature and legal qualities of a chattel into a fixture, requires a positive act on the part of the person making the annexation, and, his intention so to do should positively appear, and, if this be left in doubt, the article should be held still to be personal property.

We see no reason why the case of the potash kettles, in 5 Vt., should not govern this, as to the iron boiler. It was set in a brick-work, resting upon a stone foundation placed upon the ground, and the floor of the building was simply laid up to it, and it was in no other way attached to the building. So in *Hunt v. Mulanphy*, 1 Missouri, 508, a kettle and boilers put up in a tannery, with brick and mortar, was held not to be a fixture. See, also, *Reynolds v. Shuler*, 5 Cowen, 323, and *Raymond v. White*, 7 Cowen, 319, which was the case of a heater used for applying heat to tanners' bark, in vats and leaches.

We think the four engines, used for grinding rags into pulp, cannot be regarded as a part of the paper-mill, or as annexed to it, so as to become a part of the realty. These were fixed in large oval tubs, in the usual way, the tubs standing on timbers, and the floor of the building scribed up to them, and the engines were carried and operated by means of a band connecting them with the iron shafting from which was communicated to the engines their *motive power*. There can be no ground to claim that the tubs in which they stood were a part of the realty, and the band was used to give the engines motion, and not for fastening them to the freehold. It could be slipped off, and put on, to give them motion, or arrest it, at the will of the operator, and they could be removed without injury to the building, or the engines. The case of *Winslow v. Merchants' Insurance Company*, 4 Met. 306, where it was held that a steam engine and boilers, and the machines for working iron, upon which they operated, were fixtures, and a part of the realty, is expressly put, so far as relates to the machines for working iron, upon *the manner* in which they were *fitted and*

adapted to the mill. The words "fitted and adapted to the mill" seem to imply something more than being set down upon the floor, and fastened for convenient use, but rather a peculiar adaptation and fitting to that particular location and mill. The building was a machine shop, and the steam engine furnished the *motive power* which moved the whole machinery in the several stories of the building, by means of connecting bands or otherwise. In regard to the case of *Gale v. Ward*, 14 Mass., C. J. SHAW, in 4 Metcalf, observed, "we do not think that an authority opposed to this opinion, because it is manifest that the Court, in that case, regarded the carding machines, though ponderous and bulky, as essentially personal property, which might have been attached and removed as the personal property of the owner, even though there had been no mortgage, and they had been erected by the owner in his own mill, for his own use." Besides, so far as the steam engine is concerned, it may be said of the case in 4 Metcalf, it furnished the *motive power* for the whole building, and may be regarded as an appurtenant to the machine shop, as much so as the water power of a grist-mill, or a paper-mill. The paper presses were kept in their places by means of cleats at the top, nailed to the floor, and at the bottom by iron screws, and by taking off the iron nuts they could be removed without injuring or disturbing the building.

In regard to the iron frame in which the calendar rolls stood, it seems that was simply kept in place by means of screws at the toes of the frame, connecting it with timbers upon which it stood, and the timbers made fast to the floor by means of spikes. This could be easily removed by unscrewing the toes of the frame. The rag-cutter stood in a wooden frame, standing on the floor, and was not otherwise confined.

The trimming press was set also in a frame, and this only screwed to the floor.

The machine for making paper was kept in place by means of cleats around it, nailed to the floor, and not otherwise fastened to the building. If we regard the iron boiler as personal property, most clearly the iron pipes connected with it

only by screws and bolts, which the case says could be easily taken off, should be regarded in the same light.

The iron shafting put up in the building for the purpose of turning and putting in motion the machinery, by means of hangers of iron bolted to the beams and sills of the building, we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the *motive power* to the machinery, and should be regarded as part of the mill, as much as a water-wheel, by which a water-power is called into existence.

Though the paper-mill was placed upon the premises subsequent to the execution of the mortgage, yet it would inure to the benefit of the mortgagee, and also carry with it all that can be regarded as incident to, or a component part of the mill, but the machinery and articles which the mortgagors placed in the building, to be used by them in their business as manufacturers of paper, and not permanently attached to the building or freehold in such a manner that they could not well be removed without material injury to the chattel or freehold, did not lose their personal identity as chattels, and become a part of the realty. This, we think, has long been the views of our Courts upon this subject.

The result will be that, so far as the irons in question either constituted the whole, or were a part of the machinery, of *such a description and character*, they remained the personal property of the mortgagors, after the fire, the same as the machinery was before the fire, and the plaintiff's right of recovery should have been limited at least to the value of the iron which was used in construction of the building, such as nails, spikes, etc., and the iron shafting used for the purpose of putting and keeping the machinery in motion, and such iron, if any, as was permanently fixed or fastened to the building so as to be annexed to and become a part of the realty, according to the foregoing views.

Whether it was of any importance that the plaintiff should have taken the actual possession of these irons, after the fire, so as to perfect and keep good his title, as against the creditors

of the mortgagors, is a point not made in the case, and one which we have not considered, and much less decided.

Judgment reversed and cause remanded.

FIRST CONGREGATIONAL SOCIETY OF DUBUQUE v. FLEMING.

Supreme Court of Iowa, 1861.

11 Iowa, 533.

WRIGHT, J. When a party has, by his own tortious act, severed an article from the realty, which but for such severance would be real property, replevin will lie for its recovery. Such act, however, will not have the effect of making the property liable to execution, if it was before exempt. The only question in this case, then, is whether the property in controversy was, at the time of the seizure by defendant, exempt from execution. And it is admitted that it was so exempt if it was so attached as to constitute and become a part of the realty.

The general rule is as stated by appellant and found in *Am. & Fer. on Fixt.* 3, "that to constitute a fixture in its strict sense there must be a substantial and permanent annexation to the freehold itself, or to something connected with the freehold." And exceptions contravening the spirit and policy of this rule should not be favored. The character of the article—that is, whether it is a fixture or personal property—must, however, very often be determined from a knowledge of the purpose designed in its erection or connection. As is said in *Snedeker v. Warring*, 12 N. Y. 170, the connection of the article "with the land is looked at principally for the purpose of ascertaining whether the intent was that it should retain its original chattel character, or whether it was designed to make it a permanent accession to the land." Thus while a bell, belonging to a religious society, if left upon the ground or placed in the building, without use, might in no sense be so far of the

realty as to be exempt from execution as a part thereof, yet if placed in a frame on the church lot, and used, it would be exempt, though the posts of the frame were not let into the ground. The placing it in this position and this use indicate unmistakably the intention of the society to affix it to the realty, to render it a permanent accession to the land; to appropriate to the purpose designed, and to divest it of its original chattel character. And though it be admitted that the mere intent to thus convert it without some act would not be sufficient, yet the act and use indicate the intention, and have the effect of changing the character.

In our opinion the verdict was warranted by the testimony, and there was no error in overruling the motion for a new trial.

ANNEXATION.

STRICKLAND *v.* PARKER.

Supreme Judicial Court of Maine, 1866.

54 Me. 263.

KENT, J. The plaintiff's title to the property which is the subject of this action of trover depends upon a levy on real estate made by them. At the time of the levy, there was on the land a marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels and ship cradle, all being a part of the railway, forming its entire superstructure. The railway was made in the usual mode in constructing such works, by sleepers laid on the ground; the chain and cradle forming a necessary part of the railway.

The first question is whether the railway passed by the levy, or whether it was personal property so disconnected from the realty that it could only be seized and sold as a personal chattel.

The same principles of construction apply to a levy as to a deed, in determining what passes by the language used: *Waterhouse v. Gibson*, 4 Greenl. 230; *Winslow v. Mer. Ins.*

Co., 1. Mass. 316. This is also the rule in New York and Pennsylvania. The same rule applies to fixtures under a levy as under a deed, and an article may constitute a part of the realty, as between grantor and grantee, when it would not, under similar circumstances, be so treated as between landlord and tenant: *Powell et ux. v. Munson M. Co.*, 3 Mason, 359; *Parsons v. Copeland*, 38 Me. 537.

The levy in this case refers to the railway as part of the real estate appraised, and the debtor had its value allowed to him. Did it pass by the levy?

It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness; and that is that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgagor and mortgagee, and again modified as between the heir and the executor.

The fact of actual and permanent annexation of the thing, personal in its nature, to the freehold, was formerly regarded as essential. But this has been found to be unsatisfactory and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test: *Fay v. Muzzy*, 13 Gray, 56; *Winslow v. M. Ins. Co.*, 4 Met. 314.

Where there are no qualifications arising from the relation of the parties to each other, the question whether any erection is a fixture, and passes by deed or levy, must be determined upon the general doctrines of the law applied to the particular facts. The case of *Parsons v. Copeland*, 38 Me. 537, contains a full discussion of the general subject, and settles the

law in this State so far as its doctrines are applicable to the case before us. The marine railway, which is the subject of this suit, was laid on the earth, and was in fact affixed thereto. Indeed, the soil made an important and indispensable portion of the erection. The structure did not merely rest upon the earth, as a basis and support to a building or superstructure, which was not otherwise dependent on or indebted to the earth except as it upheld it in its place. The road-bed, so far as one was required, is made of and by the earth. Independent of the solid earth the superstructure, in itself alone, had no strength or substance required for the work to be performed. A railway consists as truly of its earth bed as of its rails and sleepers. The soil is thus a part of the whole, and not merely a resting place for a foundation on which are reared works perfect in themselves, and requiring nothing of the earth in their workings—as a factory with its machinery and wheels and belts.

It is regarded as one of the indications that the thing in question is a fixture, that it appears, from the whole case, that such was the intention of the owners of the soil who erected it. This point is stated in the case of *Parsons v. Copeland*, and is thus explained and enforced in the case of *Snedeker v. Warring* (a recent and leading case), 12 N. Y. 170: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the land."

The facts agreed to in this case, we think, clearly indicate an intention to annex the railway to the soil, and to change whatever of a chattel nature belonged to any portion, and to make it a permanent accession to the land so long as it existed.

It is the permanent and habitual annexation, and not the

manner of fastening, that determines when personal property becomes a part of the realty: *Luffkin v. Griffiths*, 35 Barb. 58; *Wall v. Hurd*, 4 Gray, 271.

The Supreme Court in New York had before them the question of what constitutes fixtures, as applied to a railroad, in the case of the *Farmers' Loan & T. Co. v. Hendrickson*, 25 Barb. 488. The exact point in controversy, in that case, was whether the locomotives and cars and the rolling stock were real or personal estate, and whether they would pass by a deed executed and recorded as a deed of real estate. The Court held that they did pass as fixtures, or real estate, by such deed. Whatever doubts we might entertain on this point, we cannot hesitate in assenting to the first proposition laid down by the Court, that "the road-bed, the rails fastened to them, and the buildings at the depots, are clearly *real property*." Indeed, no one in that case questioned this.

If we look at the numerous cases to be found in the reports we shall find in the instances in which the question of fixtures has been raised, that the principles on which they were decided to be such, and the nature of those erections confirm the view we have taken—that this marine railway was, with its necessary appendages, a fixture and passed by the levy: *Blethen v. Towle*, 40 Me. 310, a cistern above ground, on blocks; *Bliss v. Whitney*, 9 Allen, 114, platform scales; *Bishop v. Bishop*, 11 N. Y. 123, hoop poles; *Snedeker v. Warring*, 12 N. Y. 170, before cited, a statue of Washington and sun-dial. In all these cases they were held to be fixtures.

Fixtures annexed by the owner of the land to real estate pass by sale or levy as real estate: *Bliss v. Whitney*, 9 Allen, 114. And so of necessary appendages, fitted and prepared to be used with real estate: *Farrar v. Stackpole*, 6 Greenl. 154; 1 Greenl. Cruise, 41, § 7.

This railway and appendages passed to the plaintiffs by levy as real estate. They now bring this action of trover for its conversion as personal property. It is objected that, if it passed as real estate, *this* action cannot be sustained.

The levy was on twenty-three-sixtieths, in common. The

plaintiffs then became tenants in common with Cushing and others, who owned the remainder. Cushing, who had the general oversight of the business, sold the whole railway to the defendant, who thereupon took the whole up and removed it to another town, across the river, and there made a new railway out of the materials, on his own land.

We can find no authority in Cushing to sell the whole. He was at best but a co-tenant, having a general oversight, but without any authority, express or implied, to sell anything more than his own undivided interest. By the purchase, if of any validity, the defendant only became a tenant in common of an undivided portion.

If property before it was detached was a fixture, the person having title to the realty can sue for the recovery of the thing itself, after it had been detached as personal property: *Luffkin v. Griffiths*, 35 Barb. 62. *Riley v. Boston Water Power Co.*, 11 Cush. 11, which was an action for the value of certain loads of gravel, taken wrongfully from the plaintiff's land and sold by the wrong-doer to the defendants, who bought in good faith. The action was sustained: *Phillips v. Brown*, 7 Gray, 26.

The common case of trees severed from the freehold and converted, which are always regarded as personal property, is another illustration of the general rule.

But it is further contended that there has been no such interference with the property as will enable a co-tenant to maintain trover. It is urged that here has been no destruction of the common property, and the counsel for the defendant cites and relies upon the conclusion, drawn from the authority (as he understands it) in 2 Greenl. on Ev. 699—"that, to maintain the action, there must be either a destruction of the common property, or something equivalent to it, and that where the thing substantially exists, within the reach of the party, the tenancy in common remains unchanged."

Admitting that this is not too strongly stated, we do not understand that by destruction is intended a physical destruction by burning or other means, so that nothing of the materials remains. But it means that the thing owned in common

is no longer that thing, but something else, and cannot be used or possessed by the parties as before. The rule, however, as stated, has other qualifications. Anything equivalent to destruction is equally effective. And further, if the thing is so changed that it is no longer the same thing, or if removed, and put into such a condition that the co-owner cannot avail himself of his right, but the same is out "of his reach," the thing, as to him, is destroyed, within the meaning of the rule.

In this case the whole structure was taken up and removed to another town, and the materials used to construct a *new* railway on land of the defendant. The plaintiffs had no property in this new railway. They had no interest in the land and no right to enter upon it. The defendant assumed the entire right and ownership, and this was what he bought. The thing no longer existed so as to be within the reach of the party. The plaintiffs' rights were as effectually destroyed as if the whole materials had been burned.

We have no doubt that these admitted facts make out a clear case of conversion by a co-tenant, within the strictest rules that have ever been promulgated.

It has been decided in this State that a co-tenant can maintain trover against another co-tenant, who has claimed to own and assumed to sell the whole of the common property, and that these facts are sufficient evidence of conversion (33 Me. 347), or, when he has by his acts caused the destruction of it: *Ib.* To the same point, *Weld v. Owen*, 21 Pick. 559; *Boobier v. Boobier*, 39 Me. 409; *Bryant v. Clifford*, 13 Met. 138.

The rights of the parties in this suit cannot be affected by the claim set up by Mr. Cushing to retain the purchase-money paid to him, on account of his services and disbursements whilst acting as general superintendent. Those matters must be adjusted between the owners. This defendant has nothing to do with them, and he must be held liable for his act of conversion.

The damages, it is agreed, are to be assessed at twenty-three-sixtieths of \$750 and interest.

Defendant defaulted.

SNEDEKER v. WARRING.

Court of Appeals, New York, 1854.

12 N. Y. 170.

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of the defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage: *Corliss v. Van Sagin*, 29 Me. 115; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, is entirely removed by the later authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee: 15 Mass. 159; 4 Metc. 306; 3 Edw. Ch. R. 246; 1 Hilliard on Mortgages, 294, note f, and cases there cited; and see *Bishop v. Bishop*, 11 N. Y. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American Courts deciding in what cases statuary placed in a house or in

grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or wherever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar, and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures, and statues, used to spout water at fountains, were regarded as immovable, or real: Pan-

dects, lib. 19, tit. 1, § 17, vol. 7, by Pothier, 107; though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments: Corp. Juris Civ., by Kreigel, lib. 19, tit. 1, § 17; Poth. Pand., 109; Burrill's Law Dic., "Affixus." But Labeo held the rule to be "*ea quæ perpetui usus causa in ædificiis sunt, ædificiæ esse; quæ vero ad præsens, non esse ædificiæ*," thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by civilians, "its destination." Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, § 17.

And Pothier says that when, in the construction of a large vestibule or hall niches are made, the statues attached ("attachées") to those niches make part of the house, for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues; and, he says, it is of such statues that we must understand what Papinianus says: "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt*:" Pothier de Communauté, § 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty: Code Nap., § 525. But statues standing on pedestals in houses, court-yards, and gardens retain their character of "movable" or personal: 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable: 2 Répertoire Générale, Journal du Palais, by Ledru Rollin, 518, § 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work,

page 517, § 129, where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base upon which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap ("*vide choquant*"), a foundation and base no longer appropriate or useful: *Ib.*, § 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement, or ornament: 2 *Ledru Rollin, Répertoire Générale*, 514, § 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its place, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not

adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention. It was decided by the Court of Cassation in France, in *Hornelle v. Enregistr*, 2 *Ledru Rollin*, *Journal du Palais*, *Répertoire*, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established or taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues placed on the gate-posts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support.

It is said the statues and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only in their own weight. Yet that has been found sufficient to preserve many of them

undisturbed for 4,000 years: Taylor's Africa, 113, *et seq.*; and if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the Pyramids of Egypt or Cleopatra's Needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing-wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the Judge of the circuit to decide, as a matter of law, that the property was real, and to non-suit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

Stockwell v. Campbell, 39 Conn. 362.

CONSTRUCTIVE ANNEXATION.

FARRAR *v.* STACKPOLE.

Supreme Judicial Court of Maine, 1829.

6 Maine, 154.

WESTON, J., delivered the opinion of the Court: If the claim in question passed as a constituent part of the mill, the plaintiffs have made out their title, and have a right to judgment on the verdict. A considerable portion of the machinery and power of a mill, like that conveyed by the defendant, is designed to be applied to draw up logs into the mill, which is essential to the operation of one of this construction. It is not denied that other parts of the machinery intended for this purpose go with the mill; but it is insisted that the chain is of the nature of personal property, and therefore passes not by a deed of the realty, unless specially named. To this it may be answered, first, that if it be an essential part of the mill it is included in that term, whether real or personal; secondly, that that which is in its nature personal may change its character, if fixed, used, and appropriated to that which is real. Is it too much to say that the mill is incomplete without a chain, a cable, or other substitute? It may be that a millwright who contracts to erect a mill, and to furnish materials, may be deemed to have completed his engagement without supplying a chain. One millwright, a witness in this case, has testified that such is his impression. And if this is understood generally his contract might not extend further. But the owner would find that he had yet something more to procure before the mill could be in a condition to operate. The chain is the last of the parts in the machinery to which the impelling power is communicated to effect the object in view. Its actual location in the succession of parts can make no difference. If it is in its nature essential to the mill, it is included in that term; and that, as has been before remarked, whether it be personal or real property. But upon considera-

tion, we are of opinion that it ought to be regarded as appertaining to and constituting a part of the realty.

It is an ancient principle of law that certain things which in their nature are personal property, when attached to the realty, become part of it as fixtures. One criterion is that if that which is ordinarily personal be so fixed to the realty that it cannot be severed therefrom without damage, it becomes part of the realty; as wainscot work and old fixed and dormant tables and benches. Other things pass as incident to the realty, as doves in a dove-house, fish in a pond, or deer in a park: 2 Com. Dig. Biens B. On the other hand, as between landlord and tenant, for the benefit of trade, in modern times many things are regarded as personal which, as between the heir and executor, would descend to the heir as part of the inheritance.

Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to fixtures it has not been the only one. Windows, doors, and window-shutters are often hung but not fastened to a building, yet they are properly part of the real estate, and pass with it; because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention: Dane's Abr., ch. 76, art. 8, § 39. Modern times have been fruitful in inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning-rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprise of the last half-century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for the saving of human labor. Hence there has

arisen in our country a multitude of establishments for working in cotton, wool, wood, iron, and marble, some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building which shelters, incloses, and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts or to the building; but it would be a very narrow construction which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms applied to new subjects as they arise. In other words, it will understand terms used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptance.

There was at Bath, in this State, a saw-mill propelled by steam, generally called the steam saw-mill. Suppose this establishment had been conveyed by the name of the steam saw-mill, without a more particular description. What would pass? There is nothing in the books with respect to this species of property, for it is of quite modern invention; and there is no other mill of the kind in this part of the country. If you exclude such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated, incomplete, and insufficient to perform its intended operations. The parties in using the general term would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties. Salt-pans have been held to pass the realty,

and to belong to the inheritance; because adapted and designed for and incident to an establishment for the manufacture of salt. The principle is that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character, and appertain to the realty, as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question, being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim, independent of any reference to usage. The verdict is therefore sustained, although not upon a ground in accordance with the impressions of the Judge who presided at the trial. This we think, upon the whole, a fair application of the principles of law to the case. Had the term mill, however, by uniform and general usage, been understood not to embrace the chain, a different construction would no doubt have obtained; for it is a term of art, the proper meaning of which would be fixed by the general understanding of those who are skilled and experienced in it. If they were not agreed, the law would adopt that which was most general, and which would best accord with the nature and character of the subject-matter. The jury have found, upon the evidence submitted to them, that by general and uniform usage the chain passed by a deed of the mill. This finding was somewhat stronger than the evidence warranted. It did appear that there had been exceptions to this usage, but the weight of evidence went to support it. At any rate, it is apparent that the usage is rather in favor than against the construction we have adopted. But as we are of opinion that the title of the plaintiffs is well supported by the deed, independent of usage, it becomes unnecessary to decide upon the competency or effect of the testimony adduced upon this point.

Judgment on the verdict.

BURNSIDE v. TWITCHELL.

Supreme Court of New Hampshire, 1861.

43 N. H. 390.

SARGENT, J. From the case it appears that the Chandlers and Larys, being seized of certain lands in Milan and Success, on the 19th of July, 1854, conveyed the same in mortgage to one A. G. L., which mortgage was duly executed and recorded, and was by the said A. G. L., on the day of its date, assigned and delivered to the plaintiff, with the notes secured by it.

The next year, 1855, the mortgagors built a saw-mill on the premises, and procured the articles here sued for to put into said mill for use there, and they were all, except sixteen of the saws, used in said mill, as such articles are commonly used, for a year or more, and remained there till December 1, 1856; that while thus situated and thus used the plaintiff commenced proceedings to foreclose his mortgage on the premises; that his writ of entry was entered and a conditional judgment was rendered in his favor, and that possession was delivered to him March 25, 1857, of the whole premises, under a writ of possession founded on said judgment.

In the meantime, after the plaintiff had obtained his judgment, and before he got possession, the Chandlers and Larys took the saws and belting from their appropriate places in the mill, and removed them to other places in the mill and the file-room adjoining, which was a part of the establishment, for safe keeping, where they remained till after the time when the plaintiff was put in possession of the whole premises, under his writ, after which the Chandlers and Larys took all the property here in controversy and carried it to Berlin Falls, and April 27, 1857, mortgaged the same to these defendants, as chattels, the mortgage being upon sufficient consideration, and duly executed and recorded.

Before the commencement of this suit the defendants sold the saws and belting upon their chattel mortgage, but have

in no way sold or disposed of or in any way intermeddled with any of the other property, except to take the said mortgage as aforesaid.

Now, upon these facts as stated, no question arises as to any of the property claimed by this plaintiff except the saws and belting. The defendants have taken a chattel mortgage of the other property, but it does not appear that it has ever been in their possession, or that they have ever used or appropriated it in any way, or exercised any acts of ownership over it except to take the mortgage. No demand has ever been made upon them for the property, and it does not appear that they had any knowledge of the situation of the property, or of the plaintiff's claim to it.

If the property had been demanded of the respondents, and they had refused to deliver it, but had claimed to hold it on their mortgage, that would be evidence of a conversion. The Chandlers and Larys may be liable for removing the property from the mill, and their acts in mortgaging it to secure their own debt would constitute a conversion of it by them, as against this plaintiff, provided it should be held that the property was such as passed to the plaintiff by the mortgage of the real estate: *White v. Phelps*, 12 N. H. 386; *Doty v. Hawkins*, 6 N. H. 247.

In addition to purchasing property of one who has no right to sell, there must be the holding possession to the purchaser's use, or the claiming of title or some right to the same, to constitute a conversion: *Lathrop v. Blake*, 23 N. H. 46; *Hyde v. Noble*, 13 N. H. 494; *Lovejoy v. Jones*, 30 N. H. 164.

Leaving out of the case, then, everything but the saws and the belting, let us see how the case stands as to those. The same rule as to fixtures applies between mortgagor and mortgagee as is applied between vendor and vendee and executor and heir, while a different rule applies between landlord and tenant: *Kittredge v. Woods*, 3 N. H. 503; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 232, and cases cited; *Lathrop v. Blake*, 23 N. H. 64; *Wadleigh v. Janvrin*, 41 N. H. 503.

Fixtures and additions in the nature of fixtures, which are placed in a building by a mortgagor after he has mortgaged it, become part of the realty, as between him and the mortgagee, and cannot be removed or otherwise disposed of by him while the mortgage is in force: *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Pettengill v. Evans*, 5 N. H. 54; *Cole v. Stewart*, 11 Cush. 181; and in the last case it was held not only that the mortgagor could not remove such fixtures, but that any third person who should do so, by permission or request of the mortgagor, was liable for so doing to the mortgagee, though the mortgagor continued all the while in possession.

It is also well settled that where such chattels have been so attached and used as to become parts of the realty, yet when they, by the wrongful acts of the mortgagors, were severed and removed, and became chattels personal again, the property in them still remained in the plaintiff, and he could bring trespass *de bonis asportatis*, or trover for them as for other personal chattels: *Pinkham v. Gale*, 3 N. H. 484; *Sawyer v. Twiss*, 26 N. H. 348; *Plummer v. Plummer*, 30 N. H. 570; *Wadleigh v. Janvrin*, 41 N. H. 520, and cases cited.

So that although the plaintiff might have maintained trespass *quare cluusum* against the Chandlers and Larys for entering and taking away this property, if it shall be held to have become parts of this realty, yet he could also maintain trespass *de bonis* against them for carrying away the chattels after they were severed, and converting them, or trover against them or any subsequent holder under them who should convert the same to their own use. The only question then remaining here to settle is, did the saws and belting ever become parts of the belting, as between executor and heir?

As to the sixteen saws never used, they cannot be said to have been so affixed. They were never set in the mill or used there, or in any way attached to it or any part of it. The mere fact that they were purchased with the intention to be used there is not sufficient to make them fixtures. If they had been once affixed, and had been taken out to repair or to file,

while the others were at work in their place, the case would be different, for they would none the less be parts of the mill when thus removed for a temporary purpose than when in actual use.

Articles once affixed and used in such a way as to become parts of the freehold, though disannexed at the time of the sale for a temporary purpose, still pass by the conveyance of the real estate: *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 232; *Lathrop v. Blake*, 23 N. H. 66, and cases cited.

But we think that the saws that had been set and used in the mill for a year or more (and as long as it would seem as the mill was used), while thus in use were as much a part of the mill as the water-wheel or the carriage. They were made fast to portions of the mill by bolts or keys, or in some way, depending somewhat upon whether they were circular or upright saws, which the case does not show.

Machines and other articles essential to the occupation of a building or to the business carried on in it, and which are affixed or fastened to the freehold and used with it, partake of the character of real estate, become part of it, and pass by a conveyance of the land. Nor does so much depend upon the character of the fastening, whether it be slight or otherwise, as does upon the nature of the article and its use, as connected with the use of the freehold: *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 232, 233, and cases cited.

Now, a saw-mill without any saw would be about like a grist-mill without millstones, and millstones have been held to be a part of the realty, even when removed from their place and temporarily severed or disannexed from the other parts of the mill. And it would make no difference, probably, whether the stone thus disannexed was laid up to be picked or was laid in an adjoining room awaiting an occasion when it would be needed in its appropriate place again, as was the case with these saws: *Lyford's Case*, 11 Coke, 50. So in *Regina v. Wheeler*, 6 Mod. 187, it is said a mill is a known thing in law, and so are the parts thereof; and, therefore, if the owner

of a mill take out one of the millstones to pick or gravel it and devise the mill while the stone is severed from it, yet it shall pass as part of the mill.

We see no good reason why the same may not with equal propriety be held true of the saws in a saw-mill. They are actually attached to the other machinery in the mill much more strongly than the stone of the grist-mill. In the latter case, the stone only rests upon the iron-work fixed to the top of the perpendicular shaft which turns it, and is kept there by the force of gravity, while the attachment of the saws must be nice, exact, and strong; the saw must be made secure and fast, so that there may be no lateral motion; and in case of the upright saw, keys must be driven or other means used to produce the necessary tension of the saw. And still, this matter of the attachment, as we have seen, is not the controlling circumstance in the case.

The belting, also, of a mill runs from the large wheel connected with the motive power over a drum upon the main horizontal shaft, upon which are various other drums, upon which are belts connected with the various distinct portions and parts of the machinery. Whether the belting could be removed whole without removing any of the machinery, or whether, as is the case ordinarily, it could not be disengaged from the drums and shafts altogether without removing some of the permanent parts or attachments of the mill, or by disuniting the belts by removing the thongs by which the ends are usually fastened together, the case does not show.

But when a mill of any kind is constructed so as to make belts necessary in order to run the mill, they would seem to be a part, and as essential a part as any other of the mill. Some grist-mills are constructed in this way, with a belt attached to the main shaft and connected with each run of stones, another to the bolt, another to the smut-mill, etc.; others are constructed with a large cog-wheel with other smaller cog-wheels, that can be thrown into it or upon it, to carry each of the other several parts of the machinery. In one case the drums and belts perform the same office that the wheels and gearing

do in the other. The belting is as necessary as the drums, and both are as necessary in one case as the cog-wheels are in the other; one of which might be removed, perhaps, with as little trouble as the other. Why, then, should the cog-wheels be considered as a part of the mill and the belting not be so considered?

In *Wadleigh v. Janvrin*, 41 N. H., before cited, it was held that the tie-up planks, stanchion timbers, hinge staples, and tie chains belonging to a barn passed by a conveyance of the real estate, although they had all been removed, for a temporary purpose from the barn before the sale of the farm, and remained severed at the time of the sale. If these articles became fixtures by having been connected with the building as they had been, and used, as was the case there, we cannot see why, in this case, the belting should not be considered a part of the mill when it was absolutely necessary for the operation of the mill for any useful purpose. That case, we think, covers the whole ground of this case, and so do many of the authorities there cited. So does *Wilson v. The Merchants' Ins. Co.*, 4 Met. 306; *Snedeker v. Warring*, 12 N. Y. 170; *Baker v. Davis*, 19 N. H. 325; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Stackpole*, 6 Maine, 154, though the last decision seems to be founded upon a special custom or usage in the State of Maine.

We do not intend to hold that a saw might not be put into a mill and used for a temporary purpose, without any design of keeping or using it there permanently, without its becoming a fixture so as to pass with the land, or that the owner of the mill and of the machinery in it, while unincumbered, may not treat the machinery as personal property and sell or mortgage it, or that the same might not be attached as such, when, if he had sold or mortgaged the mill with its appurtenances, without reservation, the whole might have passed in the conveyance, and after third persons had thus acquired rights in it, he could not afterward treat it, nor could it be treated as personal property.

Upon the facts here stated, we think the plaintiff is enti-

tled to recover the value of the twenty-four saws and of the belting.

Judgment for the plaintiff.

Regina v. Wheeler, 6 Mod. 187 (1704).

Rolling stock: *Palmer v. Forbes*, 23 Ill. 235; *Pierce v. Emery*, 32 N. H. 484;

Titus et al. v. Mabee et al., 25 Ill. 232.

Water-wheels: *House v. House*, 10 Paige, 158.

Contra: *Hoyle v. Plattsburg, etc.*, R. R. Co., 54 N. Y. 314.

ANNEXATION UNDER CONTRACT.

1. EXPRESS.

TAFT *v.* STETSON.

Supreme Court of Massachusetts, 1875.

117 Mass. 471.

AMES, J. The steam engine, with the boiler and its appliances, was furnished and set up upon the premises by the defendant, who at the time had no title in the estate. The agreement between him and the owner was that these additions to the premises should continue to belong to him, with the right to remove them whenever he saw fit. They were, therefore, personal property: *Howard v. Fessenden*, 14 Allen, 124; *Morris v. French*, 106 Mass. 326; *Hartwell v. Kelly, ante*, 235; and never became the property of the mortgagor, and, of course, did not pass by and were not included in the mortgage. They were rightfully sold by the defendant as his own property, and there is no reason why he should be held accountable to this plaintiff for the proceeds of the sale.

With regard to the rent of the house, it does not appear that any was collected by the defendant, or that any was left uncollected by his fault or neglect. The house was occupied under a claim of right, adversely to the defendant. There having been no release of the homestead, the occupation of the house by the mortgagor and his family was rightful: *Silloway v. Brown*, 12 Allen, 30.

Decree affirmed.

Hartwell v. Kelly, 117 Mass. 235; *Dame v. Dame*, 38 N. H. 429; *Ham v. Kendall*, 111 Mass. 297; *Tift v. Horton*, 53 N. Y. 377.

Gas-pipes in streets: *Memphis Gas-Light Co. v. The State*, 6 Cold. (Tenn.) 310.

2. IMPLIED.

OSGOOD *v.* HOWARD.

Supreme Judicial Court of Maine, 1830.

6 Maine, 452.

MELLEN, C. J., delivered the opinion of the Court, in Cumberland, in August following: The question in this case seems to be a new one; or, in other words, the decision of it requires the application of certain well-settled principles to certain facts, where the application of them appears to be considered as a novelty. The facts before us are few and simple, and we wish to be understood as not extending our decision beyond those facts as they have been found by the jury. Cases whose general character might resemble the present, may easily be imagined to involve several interesting and intricate inquiries, the solution of which might be attended with many difficulties. But the finding of the jury has excluded them all from the case under consideration. The buildings whose value is demanded in this action of trover were the absolute property of Henry Howard, the deceased, at the time of his death. The land on which they were erected was then, and continues to be, the property of the defendant. They were erected on the land by his express consent. The buildings have been fairly purchased by the plaintiff, and they are his absolute property; and the defendant has converted them to his own use. Now, the question is, why should not this action be maintained? Almost all the cases which have been cited on both sides are those between lessor and lessee, or heir and executor, and they were decided upon principles of policy, or the mere nature of the property in question, independently of any express contract in relation to this subject—the former according to those usages between landlord and tenant which were established and respected for the benefit of trade, and, in some instances, of husbandry; and the latter accordingly as the subject in question partook most of the realty or personalty—whether attached

or not to the freehold. We apprehend that such cases cannot be of much use in the determination of the case at bar; for in this the express agreement between the defendant and his son as to the erection of the buildings converted by the defendant places the subject on other grounds, and at once settles the respective rights of the owner of the land and the owner of the buildings. It is not denied that if one erects a building on the land of another wrongfully, the building immediately becomes attached to the freehold, and the property of the owner of the land; but the case is different in respect to erections which are sanctioned by the relation between landlord and tenant; and for reasons still stronger, when buildings are erected by one man on the land of another, under his express license and agreement, as was the fact in the instance before us. The case of *Wells v. Banister et al.*, 4 Mass. 514, seems directly in point. There the facts were that a son built a dwelling-house on his father's land, and by his express permission. The Court, then consisting of PARSONS, C. J., and SEWALL and PARKER, Justices, in giving the opinion, say "the property of the house is personal property of the son, he having no estate in the land." We understand that, among the profession, this is the principle recognized and acted upon in practice, that such property is considered personal, and is accordingly always sold on execution in the same manner as all other personal estate is sold at auction. Should we decide this cause in opposition to the above-mentioned principle and practice, we should open a door to innumerable frauds which might be effectually committed with impunity. A person might erect expensive buildings on the land of a friend in whom he could confide, by his express permission; and thus, in case of failure in business, perhaps a contemplated or intended failure, he would enjoy a home and ample accommodations at the expense of his defrauded creditors; for if the buildings became the property of the owner of the land, then his creditors could not seize them on execution, and the friend could not be adjudged the trustee of the builder, in consequence of their standing on his land, because the houses are neither goods, effects, or

credits of the builder. We do not perceive any reason why there should not be judgment on the verdict.

Howard v. Fessenden, 14 Allen, 124.

ADAPTATION.

JENKINS v. McCURDY.

Supreme Court of Wisconsin, 1879.

48 Wis. 628.

ORTON, J. This action is brought to enjoin the defendant from entering upon the lands of the plaintiffs and removing earth or certain filling material, which had become part of the soil, and for the value of such material which has been thus removed. The defendant, by his answer, admits his entry upon the lands of the plaintiffs and removal of certain material therefrom, which he insists had not become a part of the soil or attached to the freehold, but consisted of fire-wood, piled up and so placed upon the premises as to be personal property, and that he was the owner of the same, and had the right to so enter upon the premises of the plaintiffs and remove it. This case involves the small amount of about nine dollars, and only one question, which is a mixed one of law and fact, and depends entirely upon the facts in proof, and will therefore be but briefly considered.

It appears that the plaintiffs purchased the premises of one Thompson; that at that time the material in question was upon the surface of the soil, either as fire-wood or filling; and that afterward Thompson sold said material to the defendant, and the defendant entered the premises and removed a part of such material therefrom. The character of this material in its nature and uses, its situation upon the land as being actually and physically attached or detached, and the intention of the owner when it was so placed in respect to its use, are questions of fact necessary to be considered in determining the question

of law as to whether this material had become a part of the realty, and passed by deed to the plaintiffs, or whether it was personal and movable property, and was sold to the defendant, and he thereby became the owner. The facts agreed upon, the questions of law are neither difficult nor doubtful. That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty: Tyler on Fixtures, 59, 116; Ewell on Fixtures, 31; Conklin v. Parsons, 2 Pinney, 264.

The only question in this case is, Does the evidence show the material to have been "slabs, sawdust, shavings, and other refuse matter" used to fill up low and marshy ground near the mill, as claimed by the plaintiffs, or slabs and pieces of lumber suitable for fire-wood, and piled up on the premises and intended to be used and removed as such? On this question depends the legal conclusion that the material in question is, or is not, personal or real property; and on this question the evidence is conflicting and contradictory. The Circuit Court found that the facts justified the conclusion that the material was personal property and belonged to the defendant, and made a special finding of the facts upon which such conclusion was based. Against these findings there does not appear such a clear preponderance of the evidence as would warrant us in reversing them: Green v. Feil, 41 Wis. 620, and numerous other cases in this Court, and make this the true test for the exercise of this right by this Court.

BY THE COURT.—The judgment of the Circuit Court is affirmed, with costs.

Noble v. Sylvester, 42 Vt. 146.

DISANNEXATION.

1. BY ACT OF PARTY.

GOODRICH *v.* JONES.

Supreme Court of New York, 1841.

2 Hill, 142.

COWEN, J. The Common Pleas appear to have taken the same view of Goodrich's, or rather Vose's title to the boards as did the Justice. There cannot be a doubt that they were right. Fences are a part of the freehold; and that the materials of which they were composed are accidentally or temporarily detached, without any intent in the owner to divert them from their use as a part of the fence, works no change in their nature: *Vid.* Walker *v.* Sherman, 20 Wendell, 639, 640.

With regard to the manure, we have held that even as between landlord and tenant, it belongs to the former; in other words, it belongs to the farm whereon it is made. This is in respect to the benefit of the farm, and the common course of husbandry. The manure makes a part of the freehold: *Middlebrook v. Corwin*, 15 Wendell, 169. Nay, though it be laid up in heaps in the farm-yard: *Lassell v. Reed*, 6 Greenl. 222; *Daniels v. Pond*, 21 Pick. 367 (*a*). The rule has always been still stronger in favor of the vendee as against vendor, and heir as against executor. In *Kittredge v. Woods*, 3 N. H. 503, it was accordingly decided that manure lying in a barn-yard passes to the vendee. See, also, *Daniels v. Pond*, before cited.

The case of *Kittredge v. Woods* was very well considered; and the right of the vendee to the manure, whether in heaps or scattered in the barn-yard, vindicated on principle and authority I think quite satisfactorily.

There are several English dicta which conflict with our views of the right to manure, as between landlord and tenant, and that of the Court in New Hampshire, as between vendor and vendee: And *vid.* 2 Kent's Com. 346, note c, 4th ed., and Carver *v.* Pierce, Sty. 66. But they may all be considered as repudiated by Middlebrook *v.* Corwin. *Vide* the introductory remarks of Mr. Justice NELSON, 15 Wend. 170.

The judgment of the Common Pleas must be reversed, and that of the Justice affirmed.

Judgment reversed.

McLaughlin *v.* Johnson, 46 Ill. 163; Rogers *v.* Gilinger, 30 Pa. St. 185; Harris *v.* Scovel, 48 N. W. Rep. 172; Huebschmann *v.* McHenery, 29 Wis. 655; Ogden *v.* Stock, 34 Ill. 522.

2. BY ACT OF LAW.

DAVIS *v.* EMERY.

Supreme Judicial Court of Maine, 1870.

61 Me. 140.

APPLETON, C. J. This is an action of trover to recover the value of a building to which the plaintiff claims title by a bill of sale in the following words:

“NEWFIELD, Nov. 6, 1865.

“\$40.00.

“J. B. Davis bought of Elizabeth Emery one building 23 feet wide and 50 feet long, now standing west of my house and barn. Said building is to be moved off from where it now stands by the first of May next. Price, forty dollars. Received pay.
ELIZABETH EMERY.”

The building was not removed within the time specified. Upon the foregoing writing the Justice presiding instructed the jury that if they found that the term limited in said writing was not extended prior to the first of May, A. D. 1866, by the

defendant, that the title of the building would revest in the defendant, and that the plaintiff would not have a right to go on and remove the same.

The plaintiff bought the barn and paid for it. As between the parties to this suit it must be deemed personal property. The defendant having sold it as such and received the price agreed upon cannot claim it as a part of the realty. It stands precisely as if it had been a sale of a cart or a wagon, which was to be stored by the seller for a specific time, and which was not removed by the buyer within that time. The title to the article sold and paid for would not be changed by the neglect of the purchaser to remove it at a stipulated day.

The phrase "said building is to be moved off from where it now stands by the first of May next" being included in the bill of sale to the purchaser, he must be regarded as having assented thereto and thereby impliedly to have agreed to remove it in accordance with this provision, and is liable in damages for its non-removal within the time specified: *Newell v. Hill*, 2 Met. 180; *Pike v. Brown*, 7 Cush. 133; *Maine v. Cumston*, 98 Mass. 317. There is nothing in the language indicating that the building would be forfeited and the title revest in the seller if a removal was not made by the first day of May then next.

If it is to be regarded as a license within which time the purchaser might remove the building, still the neglect to remove would not constitute a forfeiture. The purchaser might be liable in trespass for all damage done by him to the owner of the land in removing the building, but not for the value of the property removed: *Dame v. Dame*, 38 N. H. 429. The title to the property sold was in the purchaser: *Nelson v. Nelson*, 6 Gray, 385; *Nettleton v. Sikes*, 8 Met. 34.

The law relating to fixtures, whether as between grantor and grantee, mortgagor or mortgagee, or landlord and tenant, has no bearing upon the question under consideration. As between the buyer and seller the building was a personal chattel, which the purchaser was to remove in a given time, and until that time it was to remain on the seller's land. It

was the simple case of a merchant storing goods for a limited time for the purchaser, who had paid the price therefor.

The cases cited by the counsel for the defendant are inapplicable. In *Pease v. Gibson*, 6 Greenl. 81, the sale was not of a specific article but only of so much timber as the vendee might take off within the time limited in his contract. To the same effect are the cases of *Reed v. Merrifield*, 10 Met. 155, and *Howard v. Lincoln*, 13 Me. 122.

In *Vincent v. Cornell*, 13 Pick. 294, oxen were sold, the title to be perfect upon payment within a stipulated time, and the price not being paid, the title was held to remain in the vendor. So, the case of *Fairbanks v. Phelps*, 22 Pick. 535, was one of a conditional sale, the title to become perfect in the vendee when the purchase-money was paid. But in this case there was no sale on condition and there was nothing due the seller, the price having been paid at the time of the purchase.

Exceptions sustained.

As to trees—*Sterling v. Baldwin*, 42 Vt. 306.

TRADE FIXTURES.

LEMAR v. MILES.

Supreme Court of Pennsylvania, 1835.

4 Watts, 330.

SERGEANT, J. The general principle is that a fixture erected by a tenant on demised premises, for the purpose of carrying on his trade, is personal property, and may be removed or levied on by *feri facias* against him, and at his death, if not disposed of, passes to his executor. In *Lawton v. Lawton*, 3 Atk. 13, a fire-engine set up for the benefit of a colliery by a tenant for life was considered part of his personal estate, passing to the executor as assets, and not to the remainderman as annexed to the freehold, it being for the benefit of the public to encourage tenants to do what is advantageous to

the estate during their term. The same point was afterward decided in *Dudley v. Warde*, Amb. 113, where an engine of a similar kind was considered part of the personal estate, whether erected by tenant for life or in tail. In *Van Ness v. Packard*, 2 Peter's S. C. Rep. 137, the subject is carefully examined by Justice STORY, and the tenant was there held not to be liable for pulling down and removing a wooden dwelling-house, with a cellar of stone or brick foundation, and a brick chimney, which he had erected on a demised lot of ground for a term of years reserving rent, with a view of carrying on the business of a dairyman, and for the residence of his family and servants engaged in the business. The present is the case of a steam engine set up by the tenant on the demised premises and used in lieu of horse-power, for more advantageously carrying on the manufacture of salt. It must, therefore, be deemed personal property belonging to him, and as such liable to be seized and sold on the execution of his judgment creditor. In *Gray v. Holdship*, 17 Serg. & Rawle, 413, the copper kettle in the brew-house was erected by the owner of the inheritance, and would have passed to the purchaser of the building unless specially reserved; it was, therefore, part of the building within the mechanics' lien law. The case of *Morgan v. Arthurs*, 3 Watts, 140, was determined on the same grounds. But here the engine was purchased and erected by the tenant, and was never part of the inheritance.

It is supposed, however, that the terms of this lease form an exception to the general rule. There is a covenant on the part of the lessees to bore the wells to the depth of five hundred feet if practicable, and as much deeper as they please, and to make all additional and necessary erections at their own expense. It is afterward declared that should the wells fail at any time during the lease the lessees were at liberty to give them up by paying up the rent to the time of said failure; and should such failure take place within the term of three years the lessees were at liberty to take away all the metal and improvements of the works, or be paid the value thereof, at the choice of the lessor. This covenant seems to contain an im-

plication that if the lessees gave up the works after the three years, on account of failure of the water, the erections were to belong to the lessor. The reason of this covenant is not very clear; but, perhaps, it was thought right they should remain as an indemnity to the lessor for his loss, where the lessees had enjoyed the strength of the wells during, perhaps, a larger part of the term. But there was no surrender on account of failure; for although one witness for the plaintiffs said he thought the water failed the first year, he explained by saying it got weaker; it was not more than half as good, perhaps. He also states that the well was not given up to Lemar. The event contemplated, then, never occurred; and the rights of the parties can only be adjusted by the application of the usual legal principles. Besides, I am inclined to think this clause refers to erections of a more real and permanent character than an engine. The words "metal and improvements" may comprehend all permanent fixtures of iron or other metal, and all buildings, whether dwelling-houses, stables, sheds, walls, or of whatever kind, set up for the purpose of carrying on the business more conveniently; the right to remove which might have been considered as questionable, unless expressly agreed to. But for an article in itself decidedly personal, it was not necessary to make such provision, and it ought not by implication to be applied to it.

Judgment affirmed.

Poole's Case, 1 Salk. 368; Reynolds v. Shuler, 5 Cowen, 323; Moore v. Smith, 24 Ill. 512; s. c., 26 Ill. 392; Merit v. Judd, 14 Cal. 59; Davis v. Moss, 38 Pa. St. 346; Lacey v. Giboney, 36 Mo. 320; Holbrook v. Chamberlain, 116 Mass. 155; Seeger v. Pettit, 77 Pa. St. 437; Dingley v. Buffum, 57 Me. 381; Allen v. Kennedy, 40 Ind. 142; Kile v. Giebner, 7 Atl. 154.

NOTE.—As to electric poles, wires, and lamps, see 12 S. W. Rep. 489.

O'BRIEN v. KUSTERER.**Supreme Court of Michigan, 1873.**

27 Mich. 289.

GRAVES, J. On the 13th of August, 1868, the complainants in the original bill, O'Brien and Calkins, leased to the defendant Kusterer and one Werner, for three years from the 15th of the succeeding September, the east basement of Phoenix Hall, in Grand Rapids, for an eating-house or saloon, at a yearly rent of \$600, payable quarterly. The lessors, at considerable expense, fitted up the property with a bar and other conveniences, to adapt it to the business to be carried on by the lessees. Some time in the fall the lessees entered under the lease. In some little time afterward one Schoeding became associated with Werner, and the room was extensively altered and fitted up by the tenants with bowling-alleys, which were put down and connected with the floor and sleepers in a very substantial manner. The changes were numerous and thorough, and the character of the establishment was completely altered. In the course of a few months the defendant Kusterer united in himself the whole leasehold interest, by purchase or otherwise, and on the 24th of May, 1870, assigned to the defendant Conkey, and took back a chattel mortgage to secure \$350 of the purchase price. In this transaction Kusterer assumed to sell and take back a mortgage upon the alleys and other fittings, and they were described in the mortgage as "all and singular the bar, bar fixtures, ice-box, four bowling-alleys, with the balls and pins appertaining thereto, with all the chairs and tables therein, one chandelier over the bar, two street lamps and signs, with all keys, faucets, stock on hand, and all fixtures and furniture—all in the Court Place Saloon, so called—in the basement of the Phoenix Block, so called, on the north side of Lyon Street, in said City of Grand Rapids, being the same property this day sold by said Kusterer to said Conkey, and this mortgage being given for a part of the purchase price thereof."

About June 1, 1870, Conkey sold the same property to James

Irons, the complainant in the cross-bill, for the consideration of \$1,050, and Irons assumed, as part of the consideration, the payment of the chattel mortgage given by Conkey to Kusterer. At this time Kusterer assured Irons that the property was "all right," and that he would "stand between him (Irons) and all harm." A controversy had previously arisen between the complainants in the original bill, O'Brien and Calkins, and Kusterer, as to the ownership of the alleys and some other things in the establishment.

O'Brien and Calkins claimed that the bar, bar fixtures, cupboard, bowling-alley ways and racks, were permanent fixtures, and belonged to them as owners of the reversion, and the defendant Kusterer insisted that they were removable articles, and subject to and held by his mortgage from Conkey. The mortgage becoming due, and Irons declining to pay it while the title to the property was thus in dispute, Kusterer threatened to enforce his mortgage lien, and remove the property from the premises. O'Brien and Calkins thereupon filed the original bill to prevent any interference with, or removal of, the property claimed by Kusterer, and to restrain the alleged injury and waste which a removal would be likely to produce. Irons then filed the cross-bill to protect his interests as they should be affected by results.

The Circuit Court, in passing upon the case of the original bill, decreed that the bar, bar fixtures, cupboard, bowling-alley ways and racks were fixtures attached to the building, and owned by complainants, and awarded a perpetual injunction; and in passing upon the cross-cause adjudged that the defendant Kusterer should pay to Irons \$900, with interest thereon from June 24, 1870, in the place of the fixtures.

But two questions were made on the hearing in this Court, the first being whether the things in question were so annexed to the freehold as to belong to it. This question is decisively answered in the affirmative by the evidence, and it would be a waste of time to repeat it.

The second question is whether Calkins' conduct was such as to estop himself and O'Brien from claiming, against the

mortgage rights of Kusterer, that the property was permanently and immovably attached, and I think upon a fair estimate of the evidence this question should be answered in the negative.

Kusterer was a tenant holding of Calkins and O'Brien when the annexations were made, and they are to be considered as made by his direction and authority, or, at all events, with his sanction; and by itself, his sale of the things so annexed, as personalty, and the taking a chattel mortgage back upon them, could not invest him with any new right as against his landlord. Such a transaction, standing alone, could not affect the right of the landlord derived from the annexation. It might tend more or less to show that the tenant did not consider the fixtures immovable. But the landlord would not be concluded, unless shown in some satisfactory way to have assented to their being dealt with by the tenant as personalty, or things removable.

The fixtures now in question were made a part of the realty, so far as mechanical annexation could make them so, before Kusterer sold to Conkey, and got the mortgage back; and the evidence does not show that when that annexation occurred, it was one which left the tenant at liberty to sever and remove what was annexed. When this transaction with Conkey occurred, Kusterer had no title, as against O'Brien and Calkins, to these things as personalty, and he gained none by the mortgage from Conkey, unless O'Brien and Calkins in some way waived or relinquished their right derived from the annexation, or precluded themselves from asserting it against him, and this I think the evidence, when fairly considered, shows they did not do.

The decree below should be affirmed, with costs.

Talbot v. Whipple, 14 Allen, 177.

AGRICULTURAL FIXTURES.

VAN NESS *v.* PACARD.

Supreme Court of the United States, 1829.

2 Peters, 137.

Mr. Justice STORY delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the District of Columbia, sitting for the County of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial it appeared that the plaintiffs in 1820 demised to the defendant, for seven years, a *vacant* lot in the City of Washington, at the yearly rent of \$112.50, with a clause in the lease that the defendant should have a right to purchase the same at any time during the term for \$1,875. After the defendant had taken possession of the lot he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence, that upon obtaining the lease he erected the building above mentioned *with a view to carry on the business of a dairyman*, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils

of his said business were kept and scalded, and washed, and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out-of-doors; and carpenter's work was done in the house, which was in a rough, unfinished state and made partly of old materials. That he also erected on the lot a stable for his cows of plank and timber fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the Court refused to give; and the refusal constitutes his first exception.

The defendant farther offered evidence to prove that a usage and custom existed in the City of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence; but the Court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after the examinations of the witnesses for the defendant, the plaintiffs prayed the Court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the City of Washington which authorized a tenant to remove such a house as that erected by the tenant in this case; nor was it competent for the jury to infer from the said evidence that such a usage had existed. The Court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage; and after their testimony was given, he prayed the Court to instruct the jury, that upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place by which the defendant

could be justified in removing the house in question ; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The Court was divided and did not give the instruction so prayed ; and this constitutes the fourth exception.

The first exception raises the important question, what fixtures erected by a tenant during his term are removable by him ?

The general rule of the common law certainly is that whatever is once annexed to the freehold becomes part of it, and cannot afterward be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter ; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former ; and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord ELLENBOROUGH in delivering the opinion of the Court in *Elwes v. Maw*, 3 East's R. 38 ; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The Court there decided, that in the case of landlord and tenant there had been no relaxation of the general rule in cases of erections *solely for agricultural purposes*, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant they became a part of the realty and could never afterward be severed by the tenant. The distinction is certainly a nice

one between fixtures for the purposes of trade and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is now unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark that learned Judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Maw*, 3 East's R. 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold so far as it respects heirs and executors was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value if he was to lose his whole interest therein by the very act of erection? His cabin or log-hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine

were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this Court as a part of the jurisprudence of such State upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures for the purpose of carrying on a trade or manufacture is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII, 13, *a.* and *b.*, where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels *to occupy his occupation*, during the term, he may afterward remove them. That doctrine was recognized by Lord HOLR in Poole's Case, 1 Salk. 368, in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any custom) *in favor of trade and to encourage industry*. In Lawton v. Lawton, 3 Atk. R. 13, the same doctrine was held in the case of a fire-engine set up to work in a colliery by a tenant for life. Lord HARDWICKE there said that since the time of Henry VII the general ground the Courts have gone upon of relaxing the strict construction of law is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "one reason which weighs with me is its being a *mixed case*, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light it comes very near the instances in brew-houses, etc., of furnaces and coppers." The case, too, of a cider-mill, between the executor and heir, etc., is extremely strong, for though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron COMYNS, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. "It does not differ it, in

my opinion, *whether the shed be made of brick or wood*, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade even after the expiration of his term if he yet remained in possession; and Lord KENYON recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the Court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. R. 13, Lord HARDWICKE said (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East's R. 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the Court thought the building removable. In *Elwes v. Maw*, 3 East's R. 37, Lord ELLENBOROUGH expressly stated that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose it falls within the exception in favor of trade. The case of the Dutch barns before Lord KENYON¹ is to the same effect.

Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immov-

¹Dean v. Allalley, 3 Esp. Rep. 11; Woodfall's Landlord and Tenant, 219.

able. But if the residence of the family was merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was, "that the defendant erected the building before mentioned, *with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business.*" The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted, that in a business of this nature the immediate presence of the family and servants was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we are prepared to say (which we are not) that the mere fact that the house was used for a dwelling-house as well as for a trade superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron COMYNS, and Lord HARDWICKE, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. R. 29, proceeds upon principles equally liberal, and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw* in respect to erections for agricultural purposes. In our opinion the Circuit Court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the City of

Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conversant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to an away-going crop.¹ In the very class of cases now before the Court the custom of the country has been admitted to decide the right of the tenant to remove fixtures.² The case before Lord Chief Justice TREBY turned upon that point.³

The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact was solely for their consideration; open, indeed, to such commentary and observation as the Court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the Court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the Court a decision upon its relative weight and credibility, which the Court were not justified in giving to the jury in the shape of a positive instruction.

¹ 2 Starkie on Evidence, Part IV, p. 453.

² Woodfall's Landlord and Tenant, 218.

³ Buller's Nisi Prius, 34.

Upon the whole, in our judgment, there is no error in the judgment of the Circuit Court, and it is affirmed, with costs.

Elwes v. Maw, 3 East, 38; *Whitney v. Brasto*, 4 Pick. 310; *Homes v. Tremper*, 20 Johns. 29. But see 13 Pa. St. 438; *Buckman v. Outwater*, 28 N. J. Law, 518.

MIDDLEBROOK v. CORWIN.

Supreme Court of New York, 1836.

15 Wend. 169.

NELSON, J. It is laid down in several books that manure in heaps, before it is spread upon the land, is a personal chattel: 11 Viner, 175, tit. Executors; Toller's Law of Executors, 150; Matthew's Executors, 27. It further appears that it is common to insert a covenant in the lease of a farm, to leave the manure of the last year upon it. All this would seem to imply that the article belongs to the tenant, and that without a covenant he might remove it. If a farm is leased for *agricultural* purposes, good husbandry, which without any stipulation therefor is implied by law, would undoubtedly require it to be left; if rented for other purposes, this conclusion might not follow. In *Watson v. Welsh*, tried in 1785, in summing up to the jury, the Judge said that it was matter of law to determine what was using the land in a husbandlike manner, and expressed the opinion that under a covenant so to work a farm the tenant ought to use on the land all the manure made there, except that when his time was out he might carry away such corn and straw as he had not used there, and was not obliged to bring back the manure arising therefrom: Woodfall's Landlord and Tenant, 255; 1 Esp. N. P., part 2, p. 131. Perhaps this rule should be taken with some qualifications. The practice and usage of the neighboring country, and even in relation to a particular farm, should enter into the decision of the question: 4 East, 154; Doug. R. 201; Holt's N. P. R. 197; 2 Barn. & Ald. 746. This is reasonable,

because the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. What may be good husbandry in respect to one particular soil, climate, etc., may not be so in respect to another. Independently, however, of the usage and custom of the place, the rule of Mr. Justice BULLER, I apprehend, may be the correct one. In the recent case of *Brown v. Crump*, 1 Marsh, 567, Chief Justice GIBBS said that he had often heard him (Mr. Justice BULLER) lay down the doctrine "that every tenant, where no particular agreement existed dispensing with that engagement, is bound to cultivate his farm in a husbandlike manner, and to consume the produce on it. This is an engagement that arises out of the letting, and which the tenant cannot dispense with, unless by special agreement." Without carrying the doctrine to this extent, we may, I think, safely say, upon authority, that where a farm is let for agricultural purposes, no stipulation or custom in the case, the manure does not belong to the tenant, but to the farm; and the tenant has no more right to dispose of it to others, or remove it himself from the premises, than he has to dispose of or remove a fixture.

Case is the appropriate action for the injury complained of: 1 Chitty's Pl. 142. The tenant having no authority himself to remove the manure, could give none to the defendant. The judgment of the Common Pleas must be reversed, and that of the Justice affirmed.

Judgment accordingly.

Sawyer v. Twiss, 26 N. H. 345; *Wetherbee v. Ellison*, 19 Vt. 379; *Buckman v. Outwater*, 28 N. J. Law, 581. See, also, *Cory v. Bishop*, 48 N. H. 146; *Dame v. Dame*, 34 N. H. 429; *Gallagher v. Shipley*, 24 Md. 418.

DOMESTIC FIXTURES.

GAFFIELD *v.* HAPGOOD.

Supreme Judicial Court of Massachusetts, 1835.

17 Pick. 192.

PUTNAM, J. The fire-frame was without doubt personal property before it was fixed to the freehold. But afterward it became a part of the house, and would have passed by a deed of the house as a door or window of the house would have passed, provided there were no exception in the deed to the contrary. But although it is to be considered as a fixture, yet the lessee during *the continuance* of his lease might have removed it: *Lawton v. Lawton*, 3 Atk. 16, *in notis*. But he must remove it during the term. He cannot lawfully do it afterward. In *Lee v. Risdon*, 7 Taunt. 188, GIBBS, C. J., says, unless the lessee uses the privilege of severing fixtures during the term he cannot afterward do it; adding, "and it never was heard of that trover could be afterward brought."

While it remained fixed to the freehold, it is clear that if one had unfixed and taken it away at one time, it would not have been a felony, but a trespass. The case of *Penton v. Robart*, 2 East, 88, might seem to recognize the right of the tenant to remove a fixture after the expiration of the term. That was a trespass for breaking a close and removing a building. It was brought by a landlord against the tenant. The defendant made no defense to breaking and entering the close, and the plaintiff recovered a shilling for that, but the defendant pleaded a justification for removing the building as set forth in the declaration, that it was a building erected by him on the premises for the purpose of carrying on his trade, and *that he still continued in possession of the premises* at the time when, etc. The justification was held sufficient. The relation of landlord and tenant must have been considered as having continued, and *as still existing* in respect to the demised premises, notwithstanding the first term had expired. The

defendant, as it seems to me, might and ought to have pleaded the general issue as to breaking and entering the close and a justification as to the rest.

If the fixture should not be removed during the term, and the tenant should quit, and the landlord take possession afterward, the law is very clear that the fixture becomes a part of the freehold, and that the party who was tenant cannot legally take it away afterward.

And there are no facts stated in the present case which will vary this well-established rule of law.

The circumstance that the owners of the estate offered it for sale with a reservation of the fire-frame for the tenant, who was then in possession, is of no avail; because the sale was not made. The tenant sold the fire-frame to the plaintiff on the day before he left the premises. The vendee could not be in a better situation than the tenant was. He might, as has been said, have severed the frame from the chimney while his tenancy continued, but he left the premises, with the frame attached and fixed by brick and mortar to the house. It is very certain that thereupon it became the property of the owners of the freehold.

There are various annexations to the freehold estate, which, if the tenant make them at his own expense, cannot be removed by him during the term. As if he puts glass into the windows: Co. Litt. 53 *a*; and the reason given is, that the glass is become part of the house. It shall go to the heir and not to the executor, for as is said in *Herlakenden's Case*, 4 Co. R. 62, if they (the windows) be open to the tempests and rain, waste and putrefaction of the timber would follow. So I apprehend it would be, if the tenant should shingle the house, or put another story upon it. Such necessary or even expensive reparation or addition would, at this day, be considered as given to the owner of the freehold.

But the law has accommodated itself to the existing advanced state of society; and the tenant may, during the term, take away chimney-pieces, and even a wainscot, if put up by himself: Co. Litt. *ubi sup.* (Hargr. note 5); which, as the law

stood before and at the time of Lord COKE, he could not have been permitted to do.

The reason of the relaxation of the rule is found in the public policy and convenience, which permit the tenant to make the most profitable and comfortable use of the premises demised that can be obtained consistently with the rights of the owner of the freehold. The inheritance is not to be prejudiced.

The law upon this subject was very much discussed in *Elwes v. Maw*, 3 East, 38, by the Court and bar; and such annexations made with regard to trade were recognized; but such as were made in regard to agricultural improvements were still left to the operation of the old law; with what correctness of inference, it is not necessary in the case now under consideration to decide. For this case is clear of all difficulty, and is decided in favor of the defendant for the reasons before suggested.

Plaintiff non-suit.

Wall v. Hinds, 4 Gray, 271; *Bircher v. Parker*, 40 Mo. 120; *Seeger v. Pettit*, 77 Pa. St. 440; *Hayes v. Doame*, 11 N. J. Eq. 14.

TIME OF REMOVAL.

DAVIS *v.* BUFFUM.

Supreme Judicial Court of Maine, 1863.

51 Me. 160.

APPLETON, C. J. On the 7th of January, 1854, the defendant leased his saw-mill to Samuel Mitchell and A. C. Grant, who put the machinery which is the subject-matter of the present suit in the same. After remaining sometime in possession of the premises leased, they assigned the lease and sold the machinery to the plaintiffs, who thereupon entered and occupied. During their occupation, and before the expiration of the term, the defendant, by deed of warranty, dated December

15, 1854, conveyed his mill, "being known as the Buffum mill, . . . with the privileges and appurtenances thereto belonging," to Joseph Dane, Jr., and Oliver Perkins, Jr., to whom the plaintiffs attorned, paying to them rent during the residue of the term, which expired the last of July, 1855, when they quit the premises, leaving their machinery therein. On or about the 1st of September following, they made a demand upon the defendant for the articles in controversy.

It appears in evidence that the defendant, before executing his deed, claimed the machinery to be so affixed to the mill as to have become a part of the realty and not removable—and that his grantees, after its execution, claimed that they were owners of the same, but neither they nor the defendant ever interfered with the plaintiffs' possession or use of the same during the continuance of the lease, nor then, nor at any other time, prevented their removing the same.

When chattels are so far annexed to the freehold as to become fixtures, they pass, in all cases, to a grantee of the land, unless expressly excepted in the conveyance: *Preston v. Briggs*, 16 Vt. 124, and become the property of a mortgagee as against a mortgagor: *Butler v. Page*, 7 Met. 40; *Corliss v. McLagin*, 29 Me. 115. So the judgment creditor acquires them by a levy on the real estate of his debtor: *Trull v. Fuller*, 28 Me. 544. But, in the case at bar, Dane and Perkins were aware of the plaintiffs' lease and their rights under the same, and could, therefore, acquire no rights as against them, though, perhaps, they might have had a claim against their grantor on the covenants of his deed: *Powers v. Dennison*, 30 Vt. 752.

As between landlord and tenant, the latter may, during the continuance of his lease, remove fixtures erected by him for purposes of trade, manufacture, or ornament, when the removal can be effected without permanent injury to the freehold. But this removal must be made during the continuance of the lease. In *Leader v. Honewood*, 94 E. C. L. 544, it was held that an outgoing tenant has no right to enter for the purpose of severing and removing fixtures after the expiration of his term, and a new tenant has been let in possession. The general

rule is, "that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised the right to remove:" *Heap v. Barton*, 12 C. B. 274, 74 E. C. L. "All fixtures," observes REDFIELD, J., in *Preston v. Briggs*, 16 Vt. 124, "for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover cannot be maintained for a refusal to give them up." And such seems to be the law as determined in *Stockwell v. Marks*, 17 Me. 455; in Massachusetts, in *Gaffield v. Hapgood*, 17 Pick. 192; in *Shephard v. Spaulding*, 4 Met. 416; in New Hampshire, in *State v. Elliott*, 11 N. H. 540, and *Conner v. Coffin*, 2 Foster, 541; and in Connecticut, in *Burr v. St. John*, 16 Conn. 522. It was, however, held by JARVIS, C. J., in *Heap v. Barton*, 12 C. B. 274, 74 E. C. L., "that the tenant may remove the fixtures, notwithstanding the term has expired, if he remains in possession of the premises." But the plaintiffs' right of removal, whatever it was, remained unimpaired and unaffected by the defendants' deed to Dane and Perkins, and they might at any and all times have exercised it during the lease, had they so chosen.

This being an action of trover, the only question presented is whether the plaintiffs have shown an act of conversion on the part of the defendant.

The plaintiffs claim to recover on the ground that the defendant's deed to Dane and Perkins was *per se* a conversion—before the expiration of his lease.

But this is not so. When that deed was executed the plaintiffs were in the undisturbed enjoyment of their property, and so remained during the whole duration of the lease. The deed of the defendant conveyed nothing he did not own; certainly not to grantees with notice of all the facts. The giving a bill of personal property in the possession of a third person, who is the owner of the same, without any other interference therewith or delivery thereof, is not, as against such owner, a conversion by either the person giving or receiving such bill of

sale. In *Fuller v. Taber*, 39 Me. 519, the plaintiff brought an action of trover for a building which had been placed on the land of another by his precedent consent, or subsequent assent. The defendant, when a demand was made, said he had bought it and paid for it. The Court instructed the jury that taking a quit-claim deed of the land and building and putting it on record would not of *itself* constitute a conversion on the part of the individual so receiving the deed. Neither can the mere giving a deed of land leased, the lessee continuing in quiet possession, be deemed a conversion of fixtures which the tenant has a right to remove during his term. The lease was as valid after as before the deed. The rights of the lessee remained the same. The deed was no more a conversion of the tenant's fixtures than it was a breach of the covenants of the lease. The mere taking a mortgage of personal property from one having no title and recording the same, without taking possession of the mortgaged property or interfering with the same, constitutes no conversion for which trover will lie: *Burnside v. Twitchell*, 43 N. H. 390.

The demand of the plaintiffs in September, after they had quitted the premises, constituted no conversion. A demand and refusal are not necessarily a conversion, but only evidence from which a conversion may be inferred. After the expiration of the lease the tenant's right of removal ceased. "Fixtures," remarks ALDERSON, B., in *Winshall v. Lloyd*, 2 Mees. & Wels. 450, "cannot become goods and chattels until the tenant has exercised his right of making them so, which he can only exercise during his possession. The moment that expires he cannot remove them, and trover cannot, therefore, be maintained for them." In *McIntosh v. Trotter*, 3 Mees. & Wels. 184, it was held that a lessee could not, even during his term, maintain trover for fixtures which were *attached to* the freehold, and that a sale of them was not a conversion. "Would trover lie for a crop of standing corn?" inquired PARKE, B. Nor could the tenant maintain trover against his landlord for not permitting him to enter after his lease had expired, to remove fixtures which he had erected: *Stockwell v. Marks*, 17 Me. 455.

When this demand was made, the defendant had neither actual nor constructive possession of the property demanded. He had no right to it nor control over it. He could not, therefore, comply with the demand. In such cases a demand and refusal only will not support an action of trover: *Kelsey v. Griswold*, 6 Barb. 436. A defendant, in an action of trover, cannot be deemed guilty of a conversion of the property upon evidence of a demand and refusal merely, unless the property was in some way subject to his control: *Yale v. Saunders*, 16 Vt. 243. So, if the defendant has not the power to comply: *Carr v. Clough*, 6 Foster, 280; *Boobier v. Boobier*, 39 Me. 406.

Plaintiff non-suit.

Richardson v. Rogers, 37 Minn. 461; *Thorn v. Southerland*, 25 N. E. Rep. 362; *Friedlander v. Rider*, 47 N. W. Rep. 83; *Burke v. Hallis*, 98 Mass. 55; *Merit v. Judd*, 14 Cal. 59.

TIME FIXED BY CONTRACT.

WHITE'S APPEAL.

Supreme Court of Pennsylvania, 1849.

10 Pa. St. 252.

ROGERS, J. As this is a case between landlord and tenant, or rather a contest between the creditors of the latter, the claim to have the articles considered as personal property is received with latitude and indulgence. That which would otherwise be held as part of the realty, and inseparable from it, is treated, in favor of trade, as personalty, with all the incidents and liabilities of that species of property. Here, the engine and other machinery erected by the lessee to carry on the works, with the building, which is nothing more than a covering for the machinery, extending into the mines, by which the mines are worked, and are useless for any purpose unconnected with the working of the mines and transporting the coal are personal property. This is clear on the authority of *Lawton v. Salmon*, 1 H. Bl. 259, n.; *Elwes v. Maw*,

3 East. 53; 2 Pet. 137; *Lemar v. Miles*, 4 W. 330, and other cases. The building being attached to the freehold makes no difference: *Voorhis v. Freeman*, 2 W. & S. 116. Besides, if there was any doubt on general principles, that doubt is removed by the contract; for the lessors and lessee agree that all the steam engines, fixtures, and improvements erected by the lessee on the premises, from materials furnished by him, may be removed and taken away at the expiration of the lease, or other determination thereof, unless the lessors or their assigns elect to retain the same.

The sixth clause of the contract, as has been contended, does not interfere with this construction; for it extends to such houses only as may be required for the accommodation of the miners (obviously dwellings), opening and fitting up mines, making railroads, and other repairs or work done by the lessee about the demised premises. Such, according to the agreement, are to be made at the costs and charges of the lessee, without any claim on the lessors. The lessors assert no right to this machinery. It is admitted to be the property of the lessee. That consent will change property, otherwise real, into personal estate, is ruled in *Piper v. Martin*, 8 Barr, 211, and *Mitchell v. Freedley*, *ante*, 198. For, whether attached to the realty or not, or in whatever manner attached, is immaterial, when the parties agree to consider it personal property: 8 Barr, 211; 2 W. & S. 116. The building, then, and machinery, although fixtures, being chattels, are not the subject of a mechanics' lien, as is ruled in *Church & Carothers v. Griffith & Dixon*, decided at Pittsburgh at our last term. The Act of the 28th of April, 1840, has no bearing on this question, as its only effect is to modify the remedy for the recovery of a mechanics' lien, so that no greater estate, in the premises charged with the lien can be sold than was vested in the person in possession at the time the building was erected; and this, whether the lien was created before or since the passage of the Act: *Evans v. Montgomery*, 4 W. & S. 218; *O'Connor v. Warner*, *Ib.* 223. The Act curtails, but does not enlarge the right of the mechanics' lien creditor. On what species of

property the lien attaches is left as before the passage of the Act. As the cases cited show that this is not a case where mechanics are entitled to a lien, not being a building within the meaning of the Act, we are of opinion that the decree of the Court, awarding \$545.15, the amount of the mechanics' lien to Richard Hart, be reversed.

The record is remitted to the Court of Common Pleas, with orders to carry this decree into effect.

Adams v. Goddard, 48 Me. 212; *Hartwell v. Kelley*, 117 Mass. 235; *Alexander v. Tooev*, 13 Kan. 64.

CONSTRUCTION OF THE RULE.

1. BETWEEN VENDOR AND VENDEE.

MILLER *v.* PLUMB.

Supreme Court of New York, 1827.

6 Cowen, 665.

WOODWORTH, J. The first objection is to the form of the record.

A continuance is entered from June to October Term; and then an award of venire to December Term, then next, at which day came the parties; and the jurors also came. This is sufficiently plain, and must be understood that the parties and jurors appeared at December Term. Although under the statute the continuance might have been awarded from June to December, without any award of venire, the present entry is substantially the same; and, at most, is only a miscontinuance, which is cured by the statute of jeofails: 3 John. 183.

The more important question is whether the potash kettles, being affixed to the freehold, passed with the land. If they did, the Court below erred; and the judgment must be reversed, unless the case falls within some of the qualifications or exceptions to the general rule. That rule appears to be well established; whatever is affixed to the freehold becomes part of it, and cannot be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail and the reversioner; yet the rule still holds between heir and executor: Bull. N. P. 34. In *Holmes v. Tremper*, 20 John. 30, Chief Justice SPENCER says, "when a farm is sold without any reservation the same rule would apply as to the right of the vendor to remove fixtures as exists between the heir and executor."

LORD ELLENBOROUGH, in the case of *Elwes v. Maw*, 3 East, 38, lays down the law relative to fixtures as arising between three classes of persons: 1. Between heir and executor. 2. Between the executors of tenant for life or in tail and the remainderman, or reversioner. 3. Between landlord and tenant; and observes that "in the first case the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel any thing which has been affixed thereto." In the latter case the reasons for relaxing the rule are obvious, upon motives of public policy. The tenant is thereby encouraged to make improvements, and the interest of trade promoted, while the landlord or reversioner has no cause to complain, inasmuch as the farm is restored to him in the same state as when he parted with it. A different rule would effectually check all improvements by the tenant, where it is known that at the end of the term they are to be surrendered to the landlord or the reversioner of tenant for life. But the case between heir and executor and vendor and vendee is widely different. The ancestor or vendor has the absolute control, not only of the land, but of the improvements. The heir and executor are both representatives of the ancestor; the vendor has an election to sell or not to sell the inheritance.

If he does elect to sell, he knows that by law the fixtures pass; and there is no good reason why that law should interpose in his behalf, and protect him against the loss of improvements which he has deliberately chosen to part with. It is for reasons of this kind, I apprehend, the old rule of law seems still to hold. In 7 Bac. 258, this is expressly recognized. The author observes that although in an action of trover by an executor against an heir for a cider-mill, tried at Worcester, before Lord C. B. COMYNS, his lordship was of opinion that it was personal estate, and directed the jury to find for the executor; yet Lord MANSFIELD has observed that that case, in all probability, turned upon a custom; and that where no circumstances of that kind arise the rule still holds in favor of the heir seems fully established by the decision of the

Court of King's Bench, in *Lawton v. Lawton*, Easter, 22 Geo. 3. The title of the case referred to seems to be *Lawton v. Salmon*, and is to be found in 1 H. Bl. 259, note *a*. As reported, I do not find that Lord MANSFIELD, in giving this opinion of the Court, says that the case before COMYNS, C. B., turned upon a custom. Yet the whole scope of the opinion is clearly against it. He recognizes the relaxation of the old rule as confined to cases between landlord and tenant, and tenant for life and remainderman; where, for the benefit of trade, and as an encouragement to lay out money in improving the estate, there has been a departure from the old rule, which is no injury to the remainderman, because he takes the estate in the same condition as if the thing in question had never been raised. He adds: "I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mill, which is not printed at large." It was a *nisi prius* decision, and evidently considered as not controlling the general law.

From this review it appears to me that the case of vendor and vendee rests on the same ground as that of heir and executor; and that the fixtures in such cases are not considered as personal property. I incline to think the evidence of conversion was sufficient, and that the plaintiff was entitled to recover for some articles not annexed to the freehold; but as damages were recovered for the whole, which cannot now be severed, the judgment in the Court below must be reversed, and a *venire de novo* awarded by the Common Pleas of Monroe.

Judgment reversed.

Park v. Baker, 7 Allen, 78; *Philbroke v. Ewing*, 97 Mass. 133.

VENDOR TO OWNER IN COMMON.

BALDWIN *v.* BREED.

Supreme Court of Connecticut, 1843.

16 Conn. 60.

WILLIAMS, C. J. This was a writ of partition, in which the plaintiffs claimed that they and the defendants were equal owners of the land described, and the buildings, except a store thereon, which, they aver, belongs to them in severalty. The defendants plead, that they do not hold in manner and form, etc.; and a verdict is found for the plaintiffs.

The motion shows, that it was proved and admitted that Hancox, under whom the defendants claim, and Wright, under whom the plaintiffs claim, were tenants in common of the land claimed to be aparted; and that Wright erected the store upon the premises, at his sole expense. It is also claimed and not denied that the trial below proceeded upon the supposition that the plaintiffs had proved that the store was placed upon this land by Wright, with the consent of Hancox; and unless it were so, we think there could hardly have been a serious question in the case. We proceed, therefore, upon the ground that this fact constitutes part of the case; and the result to which a majority of the Court have arrived upon this point, makes it unnecessary to consider the other questions argued before us.

There is no claim that the building in question was not erected in the manner in which other buildings of this kind are erected—that is, it was permanently annexed to the freehold. Nor is it pretended that there was any contract between the parties relative to the removal or the ownership of this building, unless such contract can be inferred from the fact that it was built by one tenant in common, with the consent of his co-tenant. But the plaintiffs contend that the building thus erected belongs to him who placed it there; while the defendants contend that it follows the ownership of the land.

The general rule of law, that whatever is fixed to the realty becomes part of it, and cannot be removed, but partakes of all the incidents and properties of the freehold, is one of great antiquity: Co. Litt. 4, 53; Bull. N. P. 34. And the maxim, "*Cujus est solum ejus est usque ad cælum*" is not to be discarded as frivolous, when we consider how important it is in the designation of the ownership of property. And although in modern times it has been found necessary to introduce some exceptions to this rule, yet we agree with Justice COWEN that the actual annexation and total disconnection is the most certain and practical, and should therefore be maintained, except where plain authority or usage has created exceptions; and the general importance of the rule is so great that more evil will result from frittering it away by exceptions, than can arise from the hardship of particular cases: *Walker v. Sherman*, 20 Wend. 653-4.

The relaxation of the rule has been principally in cases between lessor and lessee, tenant for life and in tail and the remainderman: 3 Atk. 14; 16 Bul. N. P. 34. Here, the question does not arise between such parties, but between tenants in common, which case, says the learned Judge before cited, is to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties by mutual deeds of bargain and sale. As between such parties, the doctrine of a fixture's making part of the real estate and passing with it is more extensively applied than between others: 20 Wend. 638. Now, if a deed had been given of this land, by one of the joint owners, and not a word said about the buildings, or if partition deeds had been made between them, it would seem as if there could be no doubt as to the effect of such deeds, and that the buildings would pass with the lands, as well as the fences: *Isham v. Morgan*, 9 Conn. 377. The title of a purchaser or creditor ought not to be qualified or impaired, for want of an inquiry as to which of the tenants in common planted the trees, set the hedges, or erected the fences or buildings: no authority has been shown and no usage proved in support of such

a claim. And when we consider the extreme uncertainty as to title which would result from the adoption of such a principle, and the embarrassments which would attend the purchaser and the creditors, together with the anxious care which our law has shown in making as public as possible the title to real estate, we cannot consent to incorporate the principle contended for, unless compelled by authority.

A little change in the situation of parties in this case will serve to show some of the difficulties which will result.

Hancox, we will suppose, wants to sell his interest in this land; the purchaser examines the title, and finds that Hancox and Wright are the owners, and have the record title; he goes no further, but completes the purchase; after which Wright comes out with a claim that this shop was his alone, and thus defeats the record title. Or a creditor of Hancox sets off one undivided half of this land and buildings as his; he must be deprived of the store, in consequence of a private agreement between the tenants in common. Or perhaps a creditor of Wright sets off one-half the land and buildings on execution, as the estate of Wright; Wright may say that as this was his sole property, the creditor could not take one undivided half; or perhaps might claim that it ought to have been sold at the post as his personal property.

When one man voluntarily erects a building upon the land of another, without his consent, he acquires no right in the land, and retains none in the building, but the building becomes the property of him who owns the freehold: *Elwes v. Maw*, 3 East, 48; *Washburn v. Sproat*, 16 Mass. 449; 5 Day, 467. When it is erected by consent of the owner, different consequences may result; though by strict operation of law, the title vests in the owner of the land. Such, we understand, was the doctrine of this Court in *Benedict v. Benedict*. Judge SWIFT says, in strict law, the house belongs to the owner of the soil; and the same principle is advanced by C. J. PARSONS, in the case of *Wells v. Banister*, who says that by strict operation of law the father (on whose land the son had, by his consent, built a house) might disturb the son in the pos-

session of the house, and remove him from it: 4 Mass. 514. It is true that a Court of Law in Massachusetts, in the case above cited, held, that a house so built was personal property in the builder; but it is to be recollected that there was then no Court of Chancery in that State; of course, Courts of Law must adopt, to some extent, the principles of Courts of Equity.

In *Prince v. Case*, 10 Conn. 378, we alluded to these cases of *Benedict v. Benedict* and *Wells v. Banister*, as somewhat opposed to each other, without an intimation that the former decision was incorrect. In *Parker v. Redfield*, 10 Conn. 490, where the lessor had agreed with the lessee, that he might erect buildings on the land, and, at the end of the term, remove them, this Court held that the lessee had an interest in the building entirely distinct from that of the lessor, and that this interest was a subject of taxation. And the Court say, the buildings are treated [by the parties] as personal property, and are placed under the control of the lessee, as any other personal property. As the question there was a mere question of a right to tax, perhaps the result would have been the same, whether the property was treated as real or personal at law. That the Court did not intend to overrule or impair the authority of *Benedict v. Benedict* is apparent from the fact that this case is not alluded to at all in the discussion. And if that case is law, we are not able to discern any ground the plaintiffs can have to maintain this action at law. There, the Court say a Court of Chancery will give ample relief according to the circumstances of the case, and will apportion justice to the parties. A Court of Chancery can so mold such agreements as to do entire justice; as where a party claimed a parol contract to be carried into effect on the ground of part performance, but the terms of the agreement could not be distinctly made out; but as possession had been taken and improvements made, the Court allowed a reasonable compensation for beneficial and lasting improvements: *Packhurst v. Van Courtland*, 1 Johns. Ch. R. 274.

But in the case before us, we see no ground even for the interference of a Court of Chancery. No agreement is proved as

in *Parker v. Redfield*, that the shop should belong to Wright, or that he might remove it; nor is there anything to show that either party contemplated that it should be the separate property of Wright, unless it can be inferred from the consent of Hancox, asked by Wright. Does the consent of Hancox fairly authorize such an inference? For aught we know, Hancox may have consented because he had claims for some other buildings erected, or improvements made by him. The fact of Hancox's consent would no more prove that he intended the buildings should be the sole property of Wright than Wright's having consented that Hancox should erect an expensive iron fence, or a hawthorne hedge, would prove that he expected such hedge or fence should be the sole property of Hancox. For necessary and reasonable improvements made by one tenant in common, the other must be accountable; but when unusual or unnecessary expenses are incurred, it might be otherwise if done without the consent of the co-tenant. Accordingly, it may become important in reference to the account to be settled that when any extraordinary expenses are to be incurred, consent should be obtained. And this, we think, accounts entirely for the negotiations between these parties. Each had a right to occupy any part of this land, or to make improvements upon it; but improvements upon the common property must be for the common benefit: and if desired by both, must be at the joint expense. If a person claims that his case is an exception from this rule, the least that can be required of him is to show that the contract under which he claims this, demands such a construction: we cannot infer it from the naked fact that the co-tenant consented to his act.

Whatever construction is given to cases where buildings are placed on lands of others, we do not think it can control a case of this kind, where there is a common interest. In *Parker v. Redfield*, the Court proceeded entirely upon the ground that there was no common interest between the lessee and the lessor, and distinguish that case from *Osborn v. Humphrey*, by saying that there the buildings were evidently erected with a view to their permanent continuance; and there is no intima-

tion of an ownership in them separate and distinct from the ownership in the land. They were in fact a part of the land, as much as fences or any other improvements: 10 Conn. 498. The case of *Osborn v. Humphrey* was the ordinary case of a tenant for nine hundred and ninety-nine years erecting buildings on the leased land; and the Court say the buildings are attached to the land: 7 Conn. 340. And in *Winn v. Ingilby*, 5 B. & Ald. 625 (7 E. C. L. 214), the Court of King's Bench say that fixtures erected by the owner of the freehold cannot be taken in execution by the sheriff, though they might have been taken, if erected by the tenant. In the absence, then, of any special agreement between the parties, we think neither a Court of Law nor a Court of Chancery could treat this store as the separate property of one of these tenants in common. And the remark of C. J. TILGHMAN, in *Lyle v. Ducomb*, 5 Binn. 588, is entirely applicable to this case: "The idea of separating the building from the ground on which it stands is altogether novel, and cannot be carried into effect without great difficulty."

It has been suggested that the committee who may go out to make partition can settle the proportions, and adjust this matter in such a manner as to do justice between the parties. But the interest and proportions of the respective parties are settled by the verdict of the jury in this case, and must be conclusive upon the committee. The declaration alleges that the plaintiffs and defendants are joint owners in equal moieties of this land; and that the plaintiffs are sole owners of this store. This the defendants deny; and the jury have found for the plaintiffs. Now the committee must take this fact for truth, as found, or they may find directly contrary to the verdict of the jury; which cannot be allowed, any more than auditors can find that the defendant was never bailiff and receiver. If, therefore, the plaintiffs are not the sole owners of this store, manifest injustice is done by this verdict.

A majority of the Court, therefore, are of opinion that the plaintiffs ought not to retain it; and advise a new trial.

Parsons v. Copeland, 38 Me. 537; *Plummer v. Plummer*, 30 N. H. 569.

UNDER CONTRACT OF PURCHASE.

HEMENWAY *v.* CUTLER.

Supreme Judicial Court of Maine, 1863.

51 Me. 407.

APPLETON, C. J. The levy, under which the demandant claims, was made upon the demanded premises as the real estate of William Hicks, in whom the title appeared by the record to be. But Hicks had, many years before, conveyed his interest in the same to Thomas Murray, by an unrecorded deed, from whom the title passed, by various mesne conveyances, to one Jones, who gave a bond for a deed to the tenant.

The tenant, Cutler, having a bond for a deed, entered into the occupation of the premises in dispute, and, while so in occupation, erected a barn thereon, which is specially excepted from the levy as personal property belonging to him. If the barn is to be deemed personal property, it was rightfully excepted. If it was real estate, or belonged to the realty, the levy was erroneous, for it was manifest that its value was excluded from the estimate of the appraisers. A creditor cannot, by making a levy, change the character of his debtor's estate, and convert a part of it into personal property, by taking the land under the buildings and leaving the buildings as personal estate: *Grover v. Howard*, 31 Me. 546; *Jewett v. Whitney*, 43 Me. 243.

It is well settled that erections made by a mortgagor, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property: *Corliss v. McLagin*, 29 Me. 115; *Butler v. Page*, 7 Met. 40; *King v. Johnson*, 7 Gray, 239; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306.

As between Cutler and Jones, the barn must be deemed as permanently a part of the realty.

Erections made voluntarily and without a contract, or without the consent of the owner, become part of the real estate,

and inure to the benefit of the owner of the fee: *Pierce v. Goddard*, 22 Pick. 559; *Sudbury v. Jones*, 8 Cush. 189.

As between Cutler and Hicks, if the latter was the owner of the soil, the former could not claim the barn as personal property.

But it is argued that the tenant held adversely to Hicks, and would, therefore, be entitled to betterments. This may be true, but, if so, it does not give the tenant the right of removal, or make the erections by him personal property. They are part of the realty, for which the owner of the fee must pay, if, in a suit for the recovery of his land, he makes an election so to do. If the demandant elects to abandon, they, as a part of the realty, belong to the tenant upon his payment of their estimated value. If, after an abandonment by the demandant, the tenant fails to pay the estimated value of the land within the time and according to the provisions of the statute, then the improvements pass to and vest in the owner of the fee. In no event are they to be regarded as personal property, even when the tenant is evicted without suit: R. S., 1857, c. 104. In that case the tenant may recover the value of his improvements, but they are a part of the realty, and belong to the owner of the fee. The remedy of the tenant is by suit, and not by removing such of his improvements as may be removable.

In any aspect of the case, as presented, the barn erected by the tenant on the land in controversy cannot be regarded as his personal property. The levy, therefore was erroneous, by excluding its value from the appraisement.

Plaintiff non-suit.

Poor v. Oakman, 104 Mass. 309; *Ogden v. Stock*, 34 Ill. 522; *Bodlen et al. v. Barker*, 4 Kan. 446. *Contra*: *Raymond v. White*, 7 Cowen, 319; *Rosse's Appeal*, 9 Pa. St. 496.

VENDOR'S GRANT OF BUILDING.

GREENWOOD *v.* MURDOCK.

Supreme Judicial Court of Massachusetts, 1851.

9 Gray, 20.

BIGELOW, J. The estate demised to Harwood by the inhabitants of Winchendon for the term of nine hundred and ninety-nine years is in these proceedings to be treated as an estate in fee simple, by virtue of the Rev. Sts., c. 60, § 18, which provide that leasehold estates demised for one hundred years or more, so long as fifty years of the term remain unexpired, shall be regarded as an estate in fee simple, "as to everything concerning the redemption thereof when mortgaged."

The only question raised by the plaintiff is, whether the defendant acquired any interest in the land by virtue of the indenture of mortgage of August 5, 1850, between Harwood and Morse, which has been assigned to the defendant, or whether it was a conveyance only of the materials used in the construction of the building.

It seems to us that the terms of the grant bring it within the numerous cases in which it has been decided that land will pass by a deed which does not contain any description of the land, but which grants only the structure which is erected upon it, so that a grant of a barn, a shop, a house, a well, a mill, will convey a title to the land under it and necessary to its enjoyment and use: *Cheshire v. Shutesbury*, 7 Met. 566; *Forbush v. Lombard*, 13 Met. 109; *Johnson v. Raynor*, 6 Gray, 110.

In the present case the grant is of all the right, title, and interest which the grantor now has in the foundation or stonework of the building, and also of all the "right, title, and interest" which the grantor "may have in and unto said building during its erection and completion, and after it is completed, as mentioned in said lease." Now the right which

the grantor had in said foundation, stone-work, and building, under the lease, was not merely or mostly a right to the materials of which they were composed, but the more valuable right of having them on the premises as part of a structure, with a right to use and occupy them for a long period of time. It was a grant therefore of his right to the use and occupation of the land, as well as of the building or of the portion of it then erected.

Such we think was clearly the intent of the parties. It is not reasonable to suppose that the grantee, when advancing money to complete the building, would take as security for his advances a mortgage on the materials only, which were to become part of the realty, and which, by the terms of the lease, when annexed to the freehold, he would have no right to remove or in any way render available as security for his loan.

We are therefore of opinion that the respondent has a right to receive from the plaintiff for the redemption of the premises the advances made under said indenture, and the case must go to a master to determine the amount.

Sherman v. Williams, 113 Mass. 481; *Gear v. Barnum*, 37 Conn. 229.

2. MORTGAGOR AND MORTGAGEE.

WINSLOW v. MERCHANTS' INS. CO.

Supreme Judicial Court of Massachusetts, 1842.

4 Metc. 310.

SHAW, C. J. The Court are of opinion that the steam engine and boilers, and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands or other gearing, as between mortgagor and mortgagee, are fixtures, or in the nature of fixtures, and constituted a part of the realty; and that as all these fixtures were annexed to and made part of the realty by the mortgagor

they are part of the mortgaged premises, and passed by the first mortgage to the defendants.

A different rule may exist in regard to the respective rights of tenant and landlord, tenant for life and remainderman or reversioner, and generally when one has a temporary and not a permanent interest in land. In those cases the rule as to what shall constitute fixtures is much relaxed in favor of those who make improvements on the real estate of others for the purposes of trade or other temporary use and enjoyment: *Gaffield v. Hapgood*, 17 Pick. 192. But the case of mortgagor and mortgagee stands upon a different footing. The mortgagor, to most purposes, is regarded as the owner of the estate; indeed, he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee as legal owner, for the purposes of his security. The improvements, therefore, which the mortgagor, remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself and to enhance the general value of the estate, and not for its temporary enjoyment; whereas a tenant, making the same improvements upon the estate of another, with a view to its temporary enjoyment, must be presumed to do it for himself, and not for the purpose of enhancing the value of the freehold. This rule, of course, will apply only to that class of improvements consisting of articles added and more or less permanently affixed to the realty, in regard to which it is doubtful whether they are thereby made part of the realty or not, and when that question is to be decided by the presumed intent of the party making them. Take, for instance, the case of a dye-kettle set in brick-work, which is for the time annexed to the freehold, but which may be removed without essential injury to the building, and so as to leave the premises in as good a condition as if it had not been set. If so set by an owner of the fee, for his own use, it would, we think, be regarded as a fixture, an addition made to the realty by its owner, as an improvement, and would pass to the heir by descent, or to the devisee by will. But if the same addition had been made by a tenant for years, for the purpose of carrying

on his own business, we think he would have a right to remove it, provided he exercise that right whilst he has the rightful possession of the estate—that is, before the expiration of his term : 17 Pick. *ubi sup.*

Supposing the point to be clear, on the one side, as between heir and executor, and on the other, as between tenant and landlord, how does it stand as between mortgagor and mortgagee? In the case of *Union Bank v. Emerson*, 15 Mass. 159, it was held that such a kettle, set by the owner of the freehold, before the mortgage, could not be removed by the mortgagor, or taken as his personal property, but passed by the deed to the mortgagee. It was considered an immaterial fact that the mortgage deed did not mention appurtenances; probably upon the ground that if the kettle was an appurtenance, and *a fortiori*, if it was parcel, it would pass without express words : *Kent v. Waite*, 10 Pick. 138; and if it was neither, those words would not aid it. We are aware that in giving the opinion in that case it was stated by the Court that if the defendant, after making the mortgage, had put in the kettle, they would have considered him authorized to remove it before delivering possession to the plaintiffs. There is manifestly some mistake in this statement. It was *not the defendant* who made the mortgage; he was a purchaser of the kettle, the same having been removed by the mortgagor, after the plaintiffs took possession, and been sold by him to the defendant. But supposing, as is rather to be inferred from the context, that if the kettle had been put in by the mortgagor after the mortgage was made, the mortgagor would have had a right to remove it; it is to be remarked that no such point was decided by the Court, nor was it necessary, upon the facts of that case; and from the whole tenor of this very short report it seems probable that the point was not much considered.

In the recent case of *Noble v. Bosworth*, 19 Pick. 314, it was held that such kettles erected by the owner were to be deemed part of the realty and to have passed by a general deed of the estate, unless specially excepted. There the case of *Union Bank v. Emerson* was alluded to; but the point was not then

material, and the Court expressly avoided giving any opinion, either affirming or calling in question its authority as to the present point of inquiry, by stating that whatever doubt there might be as to such fixtures erected by a tenant on leased premises, *or by a mortgagor*, after the estate had been mortgaged, there was none when erected by an owner.

It is obvious that this question cannot arise where there is any express stipulation in the mortgage deed declaring either that such improvements to be made, and which are in their nature equivocal, shall or shall not be deemed fixtures, and be bound as part of the realty. The question is, what is the reasonable and legal construction of a deed, granting an estate in mortgage, in the usual terms, where there is no stipulation on the subject? Such a deed must, of course, include all additions which become *de facto* part of the realty, and which are not in their nature equivocal; because a title to the whole includes every part. In regard to articles doubtful in their nature, we have already stated as our opinion that if added by the mortgagor it is to be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment: *Hunt v. Hunt*, 14 Pick. 386. One of the objects, and indeed one of the most usual purposes of mortgaging real estate, is to enable the owner to raise money to be expended on its improvement. If such improvements consist in actual fixtures, not doubtful in their nature, they go, of course, to the benefit and security of the mortgagee, by increasing the value of the pledge. The expectation of such improvement and such increased value often enter into the consideration of the parties in estimating the value of the property to be bound, and its sufficiency as security for the money advanced. And we think the same rule must apply to those articles which in their own nature are doubtful, whether actual fixtures or not, on the ground of the presumed intention of the parties. A presumption arises from the relation in which they stand that such improvements are intended to be permanent and not temporary, and that the freehold and the improvements intended to be made upon it

are not to be severed, but to constitute one entire security. The mortgage is usually but a collateral security for money which the mortgagor binds himself to pay, and is therefore a hypothecation only, and not an alienation of the mortgaged estate. And in this respect the distinction between the tenant for years and the mortgagor is broad and obvious. The tenant for years can have no benefit from his improvements after the expiration of his term but by his right to remove them when they are capable of removal; but the mortgagor has only to pay his debt, as he is bound to do, and as it is presumed he intends to do, and then he has all the benefit of his improvements in the enhanced value of the estate to which they have been annexed. The latter, therefore, may be presumed to have intended to annex the improvements to the freehold and make them permanent fixtures, whilst the former must be presumed, from his obvious interest, to erect the improvements for his own temporary accommodation during his term, intending to remove them before its expiration.

The case of *Gale v. Ward*, 14 Mass. 352, is not, we think, an authority opposed to this opinion; because it is manifest that the Court, in that case, regarded the carding-machines, though ponderous and bulky, as essentially personal property which might have been attached and removed as the personal property of the owner, even though there had been no mortgage; and they had been erected by the owner in his own mill, for his own use.

As to what shall be deemed fixtures and part of the realty, when the question does not arise as between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to be considered personalty, is far from constituting such criterion. Doors, window-blinds, and shutters capable of being removed without the slightest damage to a house, and even though at the time of a convey-

ance, an attachment or a mortgage, actually detached, would be deemed, we suppose, a part of the house and pass with it. And so, we presume, mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws, with considerable firmness, must be regarded as chattels. The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the water works, or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage, or attachment: *Powell v. Monson & Brimfield Manuf. Co.*, 3 Mason, 466; *Farrar v. Stackpole*, 6 Greenl. 154; *Gray v. Holdship*, 17 S. & R. 415; *Voorhis v. Freeman*, 2 Watts & Serg. 116.

In the present case, we are of opinion, upon the evidence submitted to the Court, that the engine and boilers and the machines for working iron upon which they operated, considering the manner in which they were fitted and adapted to the mill, were fixtures and part of the realty, and were, of course, covered by a mortgage of the real estate.

We are also of opinion that all articles of stock, such as iron and coal, and all materials to be wrought, and the hand tools, and all implements not driven by the steam engine, and articles not annexed to the building, nor imbedded in the ground, nor constituting parts of such mill, are to be deemed personalty, and not realty, and did not pass by the first mortgage to the defendants.

In regard to the second mortgage, as far as it is a mortgage of real estate, it is not material whether the first registration was good or not; because the plaintiffs have no claim to the real estate. But it is contended on the part of the defendants

that the mortgage deed to them of May 26, 1836, was a mortgage both of real and personal property; that it was duly registered as a mortgage of personal property, in the city clerk's office, long before the plaintiffs' mortgage, and was therefore sufficient to bind the personal property.

We think there is a satisfactory answer to this claim furnished by the facts. This deed purported to be a second mortgage of the real estate before mortgaged to the defendants with all and singular the machinery, tools, goods, chattels, and other property therein contained, together with all the machinery, tools, apparatus, and other property, whether fixtures or otherwise, *now being* or remaining on the premises, and also all other machinery, engines, tools, and other property *now contemplated to be placed* in said building; said Pond, the mortgagor, warranting and agreeing that said instrument should be effectual to create a lien or mortgage on the machinery and tools afterward to be placed in said building; and he moreover stipulated, to remove all doubt, after the machinery and tools should have been actually placed therein, to execute any instrument which should be effectual and sufficient to create a lien and mortgage thereon.

In point of fact, at the time of executing this instrument, the building had not been erected, and no machinery or tools whatever were then placed in it. In truth, a considerable part of those claimed in this action were not then in existence, but were manufactured afterward. "Articles contemplated to be placed therein," though then in existence, without any schedule, enumeration, or specification whatever, is, as a description, far too indefinite and uncertain to constitute a lien upon the articles afterward actually placed in the building. The circumstance that some of the articles were in use by the mortgagor at a shop occupied by him in Water Street, and were afterward removed to the shop in Hawley Street cannot bring them within the description, vague as it is; because many of the articles so used at the shop in Water Street were not removed; others were purchased or manufactured afterward; and therefore it still remains wholly uncertain which of them

were "contemplated" to be put into the new building. The stipulation of the mortgagor to execute a further instrument of hypothecation when the articles should be put in, and thus made certain, was a good executory contract, binding upon the covenantor personally, and for a breach of which he might have been liable in damages, but not an executed contract, constituting a lien *de facto* upon articles not then bound by the mortgage.

It was objected to the plaintiffs' mortgage that it was invalid, because there was no schedule annexed, according to a stipulation contained in it. But the Court are of opinion that it was good and available for all the articles which were in the shop at the time it was executed, so far as they remained and could be identified, although no schedule was annexed. The reference to a schedule to be annexed was not to limit or restrain the generality of the previous description of the property, but it was to be inserted for greater certainty and exactness, and the better to enable the mortgagee to identify the articles. It was not, therefore, essential to the validity of the mortgage.

This case was adjusted by the parties on the principles of the foregoing opinion, and judgment was entered for the plaintiffs for the sum of \$1,161.05.

Harris v. Haynes, 34 Vt. 220; Quinby v. Manhattan Cloth, etc., Co., 24 N. J. Eq. 260; Crane v. Bigham, 11 N. J. Eq. 29.

SHERIFF'S DEED IN FORECLOSURE.

SANDS v. PFEIFFER.

Supreme Court of California, 1858.

10 Cal. 263.

FIELD, J., after stating the facts, delivered the opinion of the Court. TERRY, C. J., concurring.

The material questions for consideration are: *first*, whether the machinery in controversy was so fixed to the real property as to pass by the sheriff's deed; and, *second*, if so, whether upon its severance it became personal property so as to be recoverable in the present action.

The general rule of law is that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed as between landlord and tenant, in relation to things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee. As a general thing a tenant may remove what he has added when he can do so without injury to the estate, unless it has become by its manner of addition an integral part of the original premises: 2 Kent, 343; 1 Parsons on Con. 431, and cases cited in note. But not so a vendor; as against him all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance. Thus, potash kettles appertaining to a building for manufacturing ashes: *Miller v. Plumb*, 6 Cow. 665; a cotton-gin fixed in its place: *Bratton v. Clawson*, 2 Strob. 478; a steam engine, to drive a bark-mill: *Oves v. Ogelsby*, 7 Watts, 106; kettles set in brick, in dyeing and print works: *Despatch Line of Packets v. Belamy Co.*, 12 N. H. 207; *Union Bank v. Emerson*, 15 Mass. 159; iron stoves fixed to the brick-work of chimneys: *Godard v. Chase*, 7 Mass. 432, and wainscot-work, fixed and dor-

mant tables are held to pass to the vendee under a conveyance of the land.

In *Elwes v. Maw*, 3 East, 38, ELLENBOROUGH says that questions respecting the right to fixtures principally arise between three classes of persons: 1st, between the heir and executor; 2d, between the executors of tenants for life or in tail and the remainderman and reversioner; and, 3d, between landlord and tenant; and observes that "as between heir and executor the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto," and Mr. Justice STORY, in *Powell v. Monson and Brimfield Mfg. Co.*, 3 Mason, 465, after stating the general rule that whatever is once annexed to the freehold becomes parcel thereof, and cannot be afterward severed but by him who is entitled to the inheritance, remarks, that "as between heir and executor, the rule has never been relaxed, unless the case of the cider-mill, cited in *Lawton v. Lawton*, 3 Atk. 13, is an exception, which may, perhaps, as the note there suggests, have turned upon a custom, or, as Lord ELLENBOROUGH, in *Elwes v. Maw*, 3 East, 38, considers it, may be deemed a mixed case between enjoying the profits of land and carrying on a species of trade."

The same strict rule which applies between heir and executor applies equally between vendor and vendee and between mortgagor and mortgagee: 2 Kent, 346; *Day v. Perkins*, 2 Sand. Ch. 364.

The engine and boilers, etc., severed from the mill, in the present case were clearly fixtures within the definition of the term as given by the adjudged cases, and were covered by the mortgage, and passed to the plaintiffs with the deed of the sheriff. They were permanently fastened to the building, which had its foundation in the ground, and they could not be removed without injury to the premises: *Amos and Ferrard*, 2.

Pfeiffer possessed the right to the use and possession of the premises until the execution of the deed, but he possessed no right to despoil the property of the fixtures. The deed took

effect by relation, at the date of the mortgage, and passed fixtures subsequently annexed by the mortgagor: *Winslow v. Merchants' Ins. Co.*, 4 Met. 313. By their wrongful severance the present action was properly brought: *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Cresson v. Stout*, 17 John. 116; *Mooers v. Wait et al.*, 3 Wend. 108; *Schermerhorn v. Buell*, 4 Denio, 425; *Morgan v. Varick*, 8 Wend. 591.

It is true the plaintiffs, had they been aware of the intentions of Pfeiffer, might have applied to the Court and obtained an injunction restraining the removal, under § 261 of the Practice Act, but they were not restricted to this course. The remedy afforded by the section is only preventive; it is not exclusive of any other remedy.

The defendant, Schleischer, is the only appellant, and he admits in his answer that he was in possession of the specific articles recovered of him. The objection to the misjoinder of the defendant, Pfeiffer, should have been taken in the Court below; it cannot be taken in this Court for the first time.

Judgment affirmed.

3. HEIR AND EXECUTOR OR ADMINISTRATOR.

KINSELL *v.* BILLINGS.

Supreme Court of Iowa, 1872.

35 Iowa, 154.

MILLER, J. On the trial the defendant requested the Court to give the following, among other instructions, viz.: "If you find from the evidence that said property, when defendant took possession of it, was attached to the real estate in the form of a saw-mill, dam, etc., it was a part of and belonging to the real estate, unless you further find that it was placed there by virtue of a lease, with a right to remove at the end of said lease, or was put there by consent of or with the knowledge of the owner of the real estate, and without his objection; and

unless it was so put there under a lease or with the consent or knowledge of the owner of the said real estate, and without his objection, it was, in contemplation of law, a part of the real estate; and in order to entitle plaintiff to recover he must show such lease from said owner, or knowledge on his part of said improvements."

The Court refused to give the instruction, and this ruling is assigned as error. This instruction should have been given. The evidence tended very strongly, to say the least, to show that the mill was a part of the realty. It was erected by one who, at the time, claimed to be owner of the land on which it was situated, and it was built in a permanent manner, "partly in the bed of the river and partly in the bank;" the injury to the mill, therefore, would be an injury to the real property, and the right of action would accrue to the heir, and not to the administrator. As between landlord and tenant, the rule of law, that whatever is annexed to the realty in the form of buildings, etc., becomes a part thereof, is liberally construed in favor of the tenant; but, as between the heir and the executor or administrator, the rule obtains with the greatest rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold: 2 Kent's Com., § 25, pp. 344, 345; 1 Wash. on Real Prop., 10-12, and cases cited.

It is too well understood to require the citation of authorities that the real estate of the intestate descends to the heirs-at-law, and that the personal property only goes to the administrator, unless the latter proves inadequate for the payment of the debts of the intestate when under the statute the administrator may be empowered to sell enough of the real property to make up the deficit. See Rev., §§ 2374, 2375. An administrator has no right to receive the rents of real property accruing after the death of the intestate: *Foteaux v. Lepage*, 6 Iowa, 123, 130; *Lepage v. McNamara*, 5 Ib. 124; *Beezley v. Burgett*, 15 Ib. 192. At the common law the administrator had no control over the real estate or over the rents and profits thereof, and such is still the law, except where the statute provides otherwise.

Under the statute the administrator may maintain an action of forcible entry (Rev., § 3954); and by chapter 139 of Laws of 1866 it is provided, that "if there be no heirs or devisees of a testator or intestate present, or competent to take possession of the real estate left by such testator or intestate, the executor or administrator of his personal estate may, *as trustee for the proper heirs or devisees*, take possession of such real estate, and demand and receive the rents and profits arising therefrom, and sue for and receive the same, and do all other acts and things relating to such real estate which may be for the benefit of the person entitled thereto, and consistent with their rights and interests:" § 3.

Whether, under this provision of the statute, an action for an injury to the real estate may be maintained by the executor or administrator, we need not decide, for it is apparent that this action is not intended to be brought thereunder. The administrator or executor may, "*as trustee for the proper heirs or devisees*," take possession and collect the rents and profits, etc., only when there are "no heirs or devisees of the testator or intestate present or competent to take possession."

When acting under this statute the executor or administrator does so "as trustee for the proper heirs or devisees," and for their use and benefit, and not simply in his capacity as executor or administrator; and when suing under this provision, the existence of the facts which authorize him to sue for their benefit should be averred, viz.: That there are no heirs or devisees present or competent (as the case may be) to take possession.

The judgment of the Circuit Court is reversed.

Tuttle v. Robinson, 33 N. H. 104; Goddard v. Chase, 7 Mass. 432; Bainway v. Cobb, 99 Mass. 437; Clark v. Burnside, 15 Ill. 62; Fay v. Mussel, 13 Gray, 53.

4. DEVISEE AND EXECUTOR.

BRADNER v. FAULKNER.

Supreme Court of New York, 1866.

34 N. Y. 347.

PECKHAM, J. The question presented here is, who ultimately owned this crop of wheat? As I understand the opinion of the learned Justice who tried this cause (none was given at the General Term), he held that this wheat did not pass to the plaintiff by the devise to her of the farm; that since the Revised Statutes it would go to the executor, to be applied and distributed under other provisions of the will.

The Revised Statutes declare that "crops growing on the land of the deceased at the time of his death shall be assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of the testator or intestate, and shall be included in the inventory thereof:" 2 R. S., 82, § 6; also sub. 5.

This is plain and imperative language. Comment or illustration cannot make it plainer, and there is nothing in this case to prevent its application to this crop of wheat. There is no limitation or qualification to this statute rule. It applies as well to devisees as to heirs; no exception is made of either, and there is no reason for an exception. It is evident that the Legislature had devisees in contemplation in these provisions, as their rights are regulated in this chapter in various respects. The language of this provision being plain and clear, there is no occasion to resort to the notes of the revisers, or to any special rules of construction, to learn the legislative intent, though I think they all harmonize with the plain language of the Act.

For what purpose shall these assets go to the executors?

The statute further provides that, "if necessary for the payment of debts and legacies," the personal property of the deceased shall be sold.

That in making such sales, such articles "as are not specifically bequeathed" shall be first sold: 2 R. S., 87, §§ 27, 28.

In this case there seem to have been no debts, and the sale of this wheat, it is not pretended nor claimed, was necessary for the payment of legacies.

When it legally appeared that this wheat was not necessary for the payment of debts or legacies, the executor should then dispose of it as directed by the will.

To whom, then, did the wheat ultimately belong?

In my judgment, it belonged to the devisee of the land.

At common law, crops growing on land passed to the devisee of the land. This was conceded on the argument. They passed to the devisee upon the presumed intention of the testator, that he who took the land should take the crops which belong to it: *West v. Moore*, 8 East, 339; 1 Willard Ex. 660, and authorities there referred to. In such case, the crops did not go to the executors. This "presumed intention" of the testator might be rebutted by slight intimations in the will of a different purpose.

As, where he gave all his personal property to his executor, it was held to carry the crops to him, as against the devisee of the land: 1 Willard Ex. 602, note s.

There is nothing in this will to alter or affect the presumed intention of the testator.

The statute has not assumed to alter any rule of construction as to wills. All the alteration it has made, so far as it touches this case, is, that it has made certain things assets to go to the executor which before went to the devisee.

In the first subdivision of the sixth section it makes land held for the life of another, though specially devised, assets to go to the executor.

That land is made personal property at least for that, if not for all purposes. But if not wanted for the payment of debts or legacies, of course, when that legally appears, it goes to the devisee.

So do these crops. The statute has in no respect changed their character. They are personal property. They were so

before the statute. They are so still—only now, in all cases, whether bequeathed or devised, they primarily go to the executors, to be used, if necessary, for the payment of debts and legacies. If not necessary for that purpose, then they go to the beneficiary under the will.

But the same language that would devise or bequeath these crops before the statute, will devise or bequeath them now.

In truth, there is just as much propriety in these crops passing by a devise as by a deed in the land, though the principle upon which they pass is not the same. The rule, however, being well settled that they do pass, it is not important here to inquire as to its propriety.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

Sherman v. Willett, 42 N. Y. 146; *Dennett v. Hopkinson*, 63 Me. 350.

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